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V. KRISHNASWAMI AIYAR, B.A., B.L.

P. R. SUNDARA AIYAR, B.A., B.L.

P. S. SIVASWAMI AIYAR, B.A., B.L.

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TABLE OF CASES REPORTED,

IN THIS VOLUME.

	I. L. R.	M. L. J. Page.
Achamma v. Basappa	I. L. R., 21 M.	1
Adoni Municipal Council v. Kallamma ...	...	153
Agent and Manager, M. R. Co., v. Govinda Row	...	85
Arumugam Chetty v. Soundaraja Aiyangar ...	...	3
Arunachalam Chetti v. Aiyavaiyan ...	476	154
——— v. Meyyappa Chetti ...	91	28
Arunachela Goundan v. Ramasami Udayan ...	...	312
Asan Kothoo Sahib Mercoyar v. Ramanatha Chetty	...	159
Baluswamy v. Lakshmanan	...	193
Blake v. Savundarathammal	...	163
Chakkara Chappan v. Moidin Kutti ...	...	231
Changa Ram v. Narayani Ammall ...	...	194
Chidambaram Chettiar v. Rama Row ...	...	135
Chidambara Nadar v. Srinivasa Aiyangar ...	...	61
Chinnathal v. Viruthacha Pillai ...	...	37
Collector of Vizagapatam v. Abbul Kharim Sahib	113	4
Foulkes, Mrs. v. Muthusami Goundan ...	503	207
Gilkinson v. Subrahmania Aiyar ...	...	287
Groves v. Administrator-General of Madras ...	...	288
Hammick v. The President, Madras Municipal Commission	...	164
Ismall Peer Ambalam v. Neelamegam Servai ...	...	38
Ittappan v. Parangadan Nair	291	137
Jagapathi Mudaliar v. Ekambara Mudaliar ...	274	40
Jathavedan Nambudri v. Parameswaran Namboodri	...	309
Kanaran v. Kuttooly	110	62
Kandi Unichaman v. Ahmed Kutti Kayi ...	242	81
Karuppan Ambalam v. Ramasami Chetti ...	239	165
Krishnan v. Govinda Menon	...	294
Krishnappa Holla v. Savitri	...	91
Kuppasami Chetty v. Papathi Ammal ...	369	6
Kuthiravattah Nair v. Manavikkrama ...	...	92
Lakshmanaiyar v. Srinivasa Aiyar ...	...	64
Lakshminarayana v. Ramajogigáru ...	...	66
——— Pantulu v. Venkatrayanam ...	116	43
Mahabala Bhatta v. Kunhanna Banta ...	373	139
Manakkal Bhattathiripad v. Manakkal Damodaran	...	115
Manicka Gramany v. Ramachandra Aiyar ...	482	210
Manikam v. Tatayya	388	48

		I. L. R.	M. L. J. Page.
Marudamuthu Nadan v. Srinivasa Pillai	...	128	69
Mayandi Chetti v. Oliver, Mrs. ...	...	...	196
——————v. Samia Pillai ...	...	...	296
Mithala Cheruvittil Mammod v. Locke	...	...	7
Muniappan Chetty v. Mannarkat Muppil Nair ...		...	117
Municipal Council of Srivilliputur v. Chinnaboothanayagam Pillai ...			73
Muruga Pillai v. Subrahmania Aiyar	...	...	197
Muthappudayan v. Ammani Ammal	...	58	9
Nagammal v. Venkatagiri Aiyar ...	...	...	298
Nagoji Ramachandra v. Queen-Empress	...	...	253
Narayana Kaviroyan v. Kandasami Goundan	...	...	147
Narayanamma v. Ramayya Chetti ...	...	...	199
Nelliappa Pillai v. Thangama Nachiyar	...	406	119
Nilakanto Rotho v. Gongapani Panda	...	...	217
Nittukaruppa Goundan v. Kumarasami Goundan		...	167
Obai Goundan v. Ramalinga Aiyar	...	...	256
Odayana Tevar v. Thandavaraya Thambiran	...	...	301
Paramasiva Goundan v. Kandappa Goundan	...	...	201
Periatambi Odayan v. Vellayya Goundan	...	409	51
Putta Hegade v. Kusamma Hegadathi	...	...	168
Queen-Empress v. Makam Abayya	...	...	259
Raja of Venkatagiri v. Shaik Bade Saheb	...	...	219
Rajagopala Pillai v. Krishnasami Chetty	...	...	261
Raja Velugoti v. Venkata Rao ...	...	...	83
Ramachandra Rao v. Kuppusami Aiyar	...	...	262
Ramanathan Chetti v. Pulikuttiservai	...	288	121
Ramasami Aiyar v. Annasami Aiyar	...	...	124
Ramasamayyan v. Virasami Aiyar	...	222	126
Raman Chetti v. Kadiravalu ...	...	...	148
Ramkisoor Das v. Sreerangacharlu ...	...	421	74
Rangachariar v. Balaramasami Chetty	...	400	53
Rathnam Aiyar v. Kristna Das Vittal Das	...	494	75
Rathna Mudaliar v. Ragunadha Bhattar	...	...	173
Revur Subba Row v. Papi Reddy	...	...	149
——————v. Vengidusami Aiyar	...	...	170
Salemma v. Latchman Reddi ...	...	100	11
Sankara Nambiar v. Kanara Kurup	...	...	175
Sambasiva Chari v. Ramaswami Reddi	...	...	265
Sami Pillai v. Krishnasami Chetty	...	417	77
Sankaralinga Mudali v. Ratnasabapathi Mudali...		324	58
Satagopa Ramanuja v. Mahabir Dossji	...	...	180
Savithri Ammal v. Ramasami ...	...	...	226
Secretary of State for India v. Raja Goundan ...		...	224
Seshachalam Chetty v. Rajam Chetty	...	...	203
Seshammal v. Munisami Mudaliar	...	...	105

	I. L. R.	M. L. J. Page.
Seshayya *v.* Subbamma	...	269
Simulu Ebrahim Rowthan *v.* Abdul Rahiman Mahomed	...	182
Sitharama Sastrulu *v.* Suryanarayana Sastri ...	...	183
Sivarama Tevar *v.* Kovil Arulanatham Pillai ...	261	18
Sivasankaram Pillai *v.* Panchami Kesiyar ...	...	302
Sivathi Odayan *v.* Ramasubbayyar ...	64	21
Sooryanarayana Pandarathar *v.* Gurunatha Pillai	...	25
Sreeman Shadagopa Srinivasaswami *v.* Ramanuja Chariar	...	191
Srinivasa Aiyangar *v.* Aiyathorai Pillai ...	416	54
Sri Raja Bounnadevara *v.* Putman ...	...	185
Subrahmania Aiyar *v.* Panchanada Aiyar ...	...	109
——— Pattar *v.* Valiya Nayar ...	...	187
——— Pillai *v.* Muthukutti ...	...	84
Subrahmanyam Chetty *v.* Thayaramma ...	...	130
Thirupatiraju *v.* Rajagopala Krishnama Raju ...	...	271
Thiruvengadasami Mudaliar *v.* Raghavachary ...	...	133
Thottathil Ahmmad *v.* Muthedath Avuthraman	...	273
Vayiraven Asary *v.* Ponniah	...	151
Veerasami Chetti *v.* Liladhara Vyass ...	398	110
Veerabhadhrappa Chetty *v.* Chinnammah ...	403	189
Vellanki Venkatrama Rao *v.* Venkatasubbamma Rao	...	276
Venkatachinnayya Rao *v.* Krishna Charyalu ...	...	228
Venkatakrishnayya *v.* Narasimham ...	...	56
Venkata Narayana Reddi *v.* Papayya ...	...	205
Venkayya *v.* Ramaswamy	...	278
——— *v.* Venkata Narasimhulu ...	...	112
——— *v.* Raghavacharlu	...	79
Visvalingam Pillai *v.* Palaniappa Chetty ...	...	113
Zamindar of Tuni *v.* Bangaru Peda Bennayya ...	1	304

TABLE OF CASES CITED.

IN THIS VOLUME.

		M. L. J. Page.
A.		
Abdul Kureem v. Chukhun ...	... 5 C. L. R., 253	56
———Rahiman v. Maidin Saiba...	... I. L. R., 22 B., 507	230
Achaya v. Ratnavelu ...	... I. L. R., 9 M., 253	232
Adimulam v. Pir Ravuthan ...	... I. L. R., 8 M., 414	98
Alison v. General Council of Medical Education Registration, 1894 ...	... 1 Q. B. Dn. 750	307
Ammu v. Ramakrishna Sastri ...	...I. L. R., 2 M., 229 (Ib. 7 M. 28)	102, 103
Anantharamayyan v. Karuppan Kalingarayen ...	I. L. R., 4 M., 119	76
Annammah v. Mabbu Bali Reddi	... 8 M. H. C. R., 108	175
Appa Pillai v. Gopalasami Reddi	Madras decision of 1860, 41	163
—— Rau Sanayi Aswa Rau v. Krishnamurthi ...	I. L. R., 20 M., 249	266
Appasami v. Ramasubba ...	... I. L. R., 7 M., 262	44
Arriyapata v. Alamelu ...	... I. L. R., 11 M., 309	311
Arunachalam Chetty v. Meyyappa Chetty	... I. L. R., 21 M., 91	198, 199
Arunachella Pillai v. Apparu Pillai	... 3 M. H. C. R., 188	51
Asmutunnissa Begam v. Ashruff Ali	... I. L. R., 15 C., 488	56
B.		
Baba Mahomed v. Webb ...	... I. L. R., 6 C., 786	178
Bachiraju v. Venkatappadu	... 2 M. H. C. R., 402	13
Badri Naryain v. Jai Kishen Das	... I. L. R., 16 A., 483	50
——— Prasad v. Madan Lal ...	... I. L. R., 15 A., 75	315
Balamma v. Pullayya ...	... I. L. R., 18 M., 170	131
Balkishen Das v. Bedmate Koer	... I. L. R., 20 C., 388	50
Bama Sundari Dasi v. Adhar Chunder Sarcar	... I. L. R., 22 C., 28	107
Banno Bibi v. Mehdi Hussain ...	... I. L. R., 4 A., 325	250
Bassu Kuar v. Dhum Singh ...	... I. L. R., 11 A., 47	62
Begam v. Muhammad Yakub ...	... I. L. R., 16 A., 344	137, 139
Behari Lal v. Madho Lal ...	... I. L. R., 19 C., 241	70
Bhagirathi Panda v. Padala Gopaludu	... I. L. R., 3 M, 123	110
Bhaskarasami v. Sivaswami ...	... I. L. R., 8 M., 196	44
Bhawani Prasad v. Kallu ...	... I. L. R., 17 A., 537	126
———— v. Bisheshar Prasad Misr	... I. L. R., 3 A, 846	218
Bhomshetti v. Umabai ...	... I. L. R., 21 B., 223	60, 84
Biswa Sonan v. Binanda Chunder	... I. L. R., 10 C., 417	19,20

		M. L. J. Page.
C.		
Broadbent v. Ledward ...	... 4 Ad. and Ell. 209	142
Brookes v. Burt... ...	... 1 Beav, 106	143
Brunsden v. Humphrey ...	... 14 Q. B. D., 141	33
Buneead Singh v. Sadaseeb Dutt	2 W. R. Mis. App. 50	274
Chand Kour v. Partab Singh ...	... I. L. R., 16 C., 98	287
Chandra Prodhan v. Gopi Mohun Shaha	... I. L. R., 14 C.. 385	20
Chandu v. Kunhamed ...	... I. L. R., 14 M., 324	145
Chinnammal v. Venkatachala ...	... I. L. R., 15 M., 422	132
Chintaman v. Balhastri ...	... I. L. R., 16 B., 294	19
Chunder Coomar Deo v. Mirza Sudakat Mahomed Khan	18 W. R., 436.	42
Coburn v. Colledge (1897) ...	... 1 Q. F., 702	202
Collector of Kanara v. Krishnappa Hedge	... I. L. R., 15 B., 77	5
——— Masulipatam v. Cavaly Venkata Narrainapah	... 8 M. I. A., 551	71
Cooke v. Gill	... L. R., 8 C. P., 107	32
Culley v. DeodemTaylorson ...	... 11 A. V. E., 1808	97
D.		
Damodara Mudaliar v. Secretary of State for India,	I. L. R., 18 M., 88.	107
Davis v. Barret... ...	... 14 B., Beav. 554	24
Deendyal Lal v. Jugdeep Narain Singh	... L. R., 4 I. A., 247	315
Devachand v. Hirachand Kamraj	... I. L. R., 13 B., 449	66, 68
Dewany Roy v. Sundar Tewary	... I. L. R., 24 C., 163	165, 166
Dip Narain Singh v. Hira Singh	... I. L. R., 19 A., 532	300
Doe d Hellyer v. King ...	... 6 Exct. Rep. 791	142
Doe-Darlington v. Ulph ...	... 13 Q. B., 204	219, 221
Doe dem Graves v. Wells ...	... 10 A. & E., 435	98
E.		
East India Company v. Oditchurn Paul	... 5 M. I. A., 70	218
England v. Cowley ...	... L. R., 8 Ex., 126	275
Ex-parte Council of Kent and Council of Dover v. Ex-parte County Council of Kent and Council of Sandwich, (1891) ...	... 1 Q. B., 725	237
F.		
Field v. Hopkins ...	... 44 Ch. Div. 524	64
Foster v. Crabb ...	... 21 L. J. C. P., 189	143
G.		
Gangaraju v. Kondireddiswami ...	... I. L. R., 7 M., 61	213, 214
Ganjomoyee v. Shib Sunker ...	... 3 I. L. R., 430	230
Gopal Chunder v. Gosain Das ...	... I. L. R., 25 C., 594	230

		M. L. J. Page.
Gour Mohan Narain v. Jai Kishen Das ...	... I. L. R., 16 A., 483	50
—— Pershad Doss v. Sookdeb Ram Deb	12 S. W. R. C. R., 279	41
Griffin v. Weatherby ...	... L. R., 39 B., 753	183
Gujadhur Pauree v. Naik Pauree	... I. L. R., 8 C., 528	169
Gurusami v. Chinna Mannar ...	... I. L. R., 5 M., 37	315
Guruvayya v. Vudayappa ...	... I. L. R., 18 M., 26	51, 52

H.

Haldane v. Eckford ...	... L. R., 7 Eq., 425	306
Hall v. Cazenove ...	... 4 East, 477	220
—— v. Haward ...	... 32 Ch. Dn., 430	310
Hartley v. Moxam ...	... 3 Ad. & Ell. 701	275
Henderson v. Eason ...	... 179 B., 718	104
Hitchin v. Campbell ...	... 2 W. B., 831	34
Honywood v. Honywood ...	... I. L. R., 18 Eq., 306	274
Hovendon v. Annesley ...	... 2 Sch. Left	98
Hurdey Narain v. Rooder Perkash	... L. R., 11 I. A., 26	313
Hurrish Chander Chowdhry v. Kali Sundari Debia,	L R., 10 I. A., 4 ...	238

J.

Jamna v. Nain Sukh ...	... I. L. R., 9 A., 493	315
Jayangarulavaru v. Sri Hari Durma Dossji	... 4 M. H. C. R., 4	49, 120
Jogodindro Nath v. Sarut Sunduri Debi	... I. L. R., 18 C., 322	75
Joykissen Mookerjee v. Peary Mohun Mookerjee	24 W. R., 40	255

K.

Kailash Mondul v. Barada Sundari Dassi,	... I. L. R., 24 C., 711	33
Kakaji Ranoji v. Bapuji Madhav Rau	... 8 B. H. C. R., 245	100
Kameswar Pershad v. Rajkumari Rattan Koer ...	I. L. R., 20 C., 86	35
Karuppam Zemindar v. Sadasiva	... I. L. R., 10 M., 66	79, 81
Kehoe v. Marquess of Lansdowne (1893)	... App. Cases, 466	285
Keshav Ram Krishna v. Govind Ganesh	... I. L. R., 9 B., 96	174
Khalilul Rahman v. Gobind Pershad	... I. L. R., 20 C., 328	315
Khoob Lall v. Jungle Singh ...	... I. L. R., 3 C., 787	66, 65
Khurshedji v. Pestonji ...	... I. L. R., 12 B., 578	150
Knight v. Tabernace Permanent Building Society in re 1892	... 2 Q. B., 615	237
Knowles v. Roberts ...	... 38 Ch. Dn., 270	306
Krishna Behari Roy v. Brojeswari	... 2 I. R., I. A., 283	35
———— Rao v. Shankara ...	... I. L. R., 17 B., 164	174
Krishnaswami Aiyangar v. Rajagopal Aiyangar	I. L. R., 18 M., 73	218
Konna Panikar v. Karnakara, ...	... 16 M., 328	310
Krishnayya v. Unnissa Begam ...	... I. L. R., 15 M., 399	292
Kudhai v. Sheo Dayal ...	... I. L. R., 10 A., 570	311

		M. L. J. Page.
Kumara Akkappa *v.* Sithala Naidu	5 M. H. C. R., 293, *Ib.* 476	266
Kumarasamy *v.* Nallakunnu ...	... I. L. R., 9 M., 39	213
Kunhammed *v.* Narayanan Mussad	I. L. R., 12 M. B., 20	278
Kunhali Beari *v.* Keshava Shanbaga	... I. L. R., 11 M., 76	128
Kunhi *v.* Seshagiri ...	... I. L. R., 5 M., 141	54
Kuttiammal *v.* Radakrishna ...	... I. L. R., 18 M., 120	182

L.

Lachmeswar Singh *v.* Manowar Hossein	... I. L. R., 19 C., 253	104
Lakshmana *v.* Ramachandra ...	... I. L. R., 10 M., 351	278
Lakshmanammal *v.* Tiruvengada	... I. L. R., 5 M., 250	131
Lalje *v.* Fakir	... I. L. R., 6 C., 138	315
Leigh *v.* Hewitt ...	... 4 East, 159	283
Linga Reddi *v.* Sama Rau ...	... I. L. R., 17 M., 469	157

M.

Macrae *v.* Goodman ...	... 5 M. P. C. C., 315	24
Madhub Chandra Samanta *v.* Deo Nath Karâmkar	2 Calcutta W. Notes 76	50
Mahomed Muse *v.* Jijibhai Bhagvan	... I. L. R., 9 B., 524	64
Mallamma *v.* Venkatappa, ...	... I. L. R., 8 M., 277	51
Mansab Ali *v.* Nihal Chand ...	... I. L. R., 15 A., 359	287
Mari *v.* Chinnammal ...	... I. L. R., 8 M., 130	131
Martin *v.* Kennedy ...	... 2 Bos. & Pul. 69	34
Mashiat Kur Nissa *v.* Rani, ...	.. I. L. R., 13 A., 1	230
Mohesh Mahto *v.* Sheik Piru ...	... I. L. R., 2 C., 471	230
Moidin *v.* Oothumanganni ...	... I. L. R., 11 M., 416	103
Muhammad Naim-ul-lah Khan *v.* Ishan-ul-lah Khan...	... I. L. R., 14 A., 226	250
Muniappa Naik *v.* Subramania Ayyan	... I. L. R., 18 M., 437	3
Munna Singh *v.* Gajadhar Singh	... I. L. R., 5 A., 582	194, 195
Munshee Buzloor Ruheem *v.* Shumsoon Missa Begum	... 11 M. I. A., 605	94
Mussad *v.* The Collector of Malabar	... I. L. R., 10 M., 191	102, 103
Mussammat Chand Kour *v.* Partab Singh	... L. R., 15 I. A., 157	94
Mussammat Bhoobun Moyee Debia *v.* Ram Kishore	... 10 M. I. A., 279	175
Mussammat Nanomi *v.* Modun Mohun	... L. R., 13 I. A., 9	128, 315
Mussamat Sirdar Begum *v.* Mussamat Izzatoot Nissa	N. W. P. H. C. R., 140	41
Mussat Hakemoonissa *v.* Buldes	3 N. W. P. H. C. R., Agra, 222	41
Muthu *v.* Chellappa ...	... I. L. R., 12 M., 479	229
Muttayan Chetty *v.* Sangili ...	... L. R., 9 I. A., 128	315
Muttia *v.* Appasami ...	... I. L. R., 13 M., 504	193, 194

		M. L. J. Page.

N.

Nabin Chandra *v.* Mucta Sundari	...7 B. L. R. Appx. 38	145
Nand Ram *v.* Sita Ram ...	... I. L. R., 8 A., 545	29, 81
Nallanna *v.* Ponnal ...	... I. L. R., 14 M., 150	131, 132
Narayana Kothan *v.* Kalyanasundaram Pillai	... I. L. R., 19 M., 219	293
Narasinga *v.* Subba ...	... I. L. R., 12 M., 139	315
Narayana Nambi *v.* Pappi Brahmani	... I. L. R., 10 M., 23	19, 20
Natesaiyar *v.* Ponnusami ...	... I. L. R., 16 M., 99	126
Nathu Valad Pandu *v.* Budhu Valad Bhikka	... I. L. R., 18 B., 537	147
Naviva Boo *v.* Turner ...	... L. R., 16 I. A., 156	236
Nilmoni Singh Deo *v.* Taranath Mukerjee	... I. L. R., 9 C., 295	237
Nobo Kishore Sarma Roy *v.* Hari Nath Sarma Roy,	I. L. R., 10 C., 1102	72
Norendar Narain Singh *v.* Dwarka Lal Mundar..	L. R., 5 I. A., 18	311

O.

Ongole Municipal Chairman *v.* Mounsey	... I. L. R., 17 M., 453	164
Overseers of the Poor of Walsall *v.* London and North-Western Railway Company	... L. R., 4 A. E., 30	238

P.

Pappi Reddi *v.* Narasa Reddi ...	... I. L. R., 16 M., 464	137, 138
Pattat Ambadi Marar *v.* Krishnan	... I. L. R., 11 M., 290	263, 264
Pearce *v.* Morris ...	... L. R., 5 Ch. 227	310
Peary Mohund Aich *v.* Anunda Charan Biswas...	I. L. R., 18 C., 631	———
Perayya *v.* Venkata, ...	... I. L. R., 11 M., 403	63
Peria Venkan Udaya Tevar *v.* Subramanian Chetti	... I. L. R., 20 M., 238	224
Perumal Ayyan *v.* Alagiri Sami Bhagavathar	... I. L. R., 20 M., 245	168
Pittapur Raja *v.* Surya Rao. ...	... I. L. R., 8 M., 520	32, 94
Ponnappa Pillai *v.* Pappuvayyangar	... I. L. R., 9 M., 343	126
———————	... I. L. R., 4 M., 64	315
Premsookh *v.* Prithee Ram ...	2 M. W. P. H. C. R., Agra, 222	41
Prosanno Coomar Sanyal *v.* Kasi Das Sanyal	... 19 I. A., 166	78
Pursid Narain Sing *v.* Hanooman Sahay	... I. L. R., 5 C., 845	315
Puttappa *v.* Timmaji ...	... I. L. R., 14 B., 177	130

R.

Radhakrishna *v.* Kuttiammal ...	... 8 M. H. C. R., 88	131
Rajaram *v.* Narasinga ...	... I. L. R., 15 M., 199	207
Raj Rukhee *v.* Gokool Chunder	... 13 M. I. A., 209	71
Rakkal Chunder Bose *v.* Dwarka Nath Misser	... I. L. R., 13 C., 346	55
Raghava *v.* Rajagopal ...	... I. L. R. M.,	211, 213
Raghu Nath Pershad *v.* Harlal Sadhu	... I. L. R., 18 C., 320	7
Rajagopal, *in re* ...	... I. L. R., 9 M., 443	232

	I. L. R.	M. L. J. Page.
Rama v. Venkatachalam ...	... I. L. R., 8 M., 577	68
Ramachandra Rayaguru v. Modhu Padhi	... I. L. R., 21 M., 326	218
Ramanadhan v. Zemindar of Ramnad	... I. L. R., 16 M., 407	278
Ramappudayan v. Arumukathudayan	... I. L. R., 17 M., 182	132
Rama Row v. Venkatesa Bandari	... I. L. R., 5 M., 171	77
Ramasami v. Bhaskarasami ...	... I. L. R., 2 M., 67	48
——— Aiyar v. Municipal Council of Salem	... I. L. R., 18 M., 183	73, 74
——— Ayyangar v. Bagirathi Ammal	... I. L. R., 6 M., 180	292
——— Chetti v. Ramasami Chetti	... I. L. R., 5 M., 220	66,68
Ramayyan v. Srinivasa Pattar ...	... I. L. R., 19 M., 230	53
Ramayyar v. Tirtasami ...	... I. L. R., 7 M., 61	212, 213
——— v. Vedachalla ...	... I. L. R., 14 M., 441	212
Ram Dhun Dhur v. Mohesh Chunder Chowdhry	I. L. R., 9 C., 406	251
Ranga Reddi v. Chinna Reddi ...	... I. L. R., 14 M., 465	151
Rangasami v. Muttukumarappa	... I. L. R., 10 M., 509	218
——— Naickan v. Varadappa Naickan	... I. L. R., 17 M., 465	121
Raghunath Pershad v. Abdul Hye	... I. L. R., 14 C., 26	230
Read v. Brown ...	... 22 Q. B. D., 128	32, 94
Reys v. London Assurance Corporation	...(1897) 2 Q. B. D., 142	143
Ricketts v. Mornington, 7 Simon	... 200	306
Roberts v. Holland ...	... (1893), 1 Q. B., 665	143
Rustom Singh v. Moti Singh ...	... I. L. R., 18 A., 474	107

S.

Sakaram Mahader Dange v. Harikrishna Dange	I. L. R., 6 B., 113	123
Salt v. Marquess of Northampton	... 92 A. C. 1	64
Samayya v. Nagalingam ...	... I. L. R., 15 M., 174	157
Sangali v. Mookan ...	... I. L. R., 16 M., 350	123
Sankaran v. Raman Kutti ...	... I. L. R., 20 M., 152	232
Satyesh Chunder Sircar v. Dhunpul Singh	... I. L. R., 24 C., 20	258
Sawaba Khandaha v. Abaji Jotirar	... I. L. R., 11 B., 475	82
Sayad Abdul Hax v. Gulam Jilami	... I. L. R., 20 B., 677	64
Secretary of State v. Astamurti	... I. L. R., 13 M., 118	118
Sengamalathammal v. Velayuda Mudali	... 3 M. H. C. R., 314	13
Serrao v. Noel	... 15 Q. B. D., 554	94
Sheikh Abdul Sabhan Chowdhry v. Shibkisto Daw	...3 B. L. R., Appx. 15	42
Sheo Prasad v. Hira Lal ...	... I. L. R., 12 A., 440	292
Shib Kristo Dah v. Abdool Sobhan Chowdhry ...	15 W. R., 409	147
Shiddappa v. Irava ...	... I. L. R., 18 B., 737	66, 68
Shooshee Bhusan v. Gobind Chunder	... I. L. R., 18 C., 231	266
Siva Subrahmania v. Secretary of State for India	I. L. R., 9 M., 302	118
Srinivasa v. Sivakolundu ...	... I. L. R., 12 M., 349	150
Srinivasa Ayyangar v. Srinivasaswami	... I. L. R., 16 M., 31	121, 192
——— Bhatta v. Malayacha Pauree	... I. L. R., 8 C., 528	169

	I. L. R.	M. L. J. Page.
Sri Pratapa Raghunada Deo's Case ...	I. L. R., 1 M., 69	174
Subbakka *v.* Viraraghava Reddi ...	I. L. R., 5 M., 397	51
Subbaraya *v.* Srinivasa	I. L. R., 7 M., 262	44
Sundara Gopalan *v.* Venkatavaradaiyangar ...	I. L. R., 17 M., 228	195
Sundarammal *v.* Rangasami Mudali ...	I. L. R., 18 M., 198	132
Suraj Bunsi Koer *v.* Sheo Prasad ...	L. R., 6 I. A., 88	315
Suryanarayana *v.* Appa Rau	I. L. R., 16 M., 40	43, 44
T.		
Tadigotla Timmappa *v.* Lakshmana ...	I. L. R., 5 M., 385	7
Thakur Prasad *v.* Fakirullah	I. L. R., 17 A., 10	20
Thorogood *v.* Robinson	6 Ad. & Ell., 769	275
Tulsi Pershad Singh *v.* Ram Narain Singh ...	I. L. R., 12 C., 117	207, 208
U.		
Ukha *v.* Daga	I. L. R., 7 B., 182	95, 100
Unnian *v.* Raman	I. L. R., 8 M., 415	188
V.		
Vanangamudi *v.* Ramasami	I. L. R., 14 M., 406	233, 234
Vasudeva Upadyaya *v.* Visvaraja Thirthasami ...	I. L. R., 20 M., 407	232
Veeramma *v.* Abbiah	I. L. R., 18 M., 99	266
Venkatarama *v.* Senthi Velu	I. L. R., 13 M., 265	315
Venkata Reddi *v.* Taylor	I. L. R., 17 M., 100	249
Vinayak Janardhan *v.* Mainai	I. L. R., 19 B., 138	100
Viraragava *v.* Krishnasami	I. L. R., 6 M., 344	39, 40
W.		
Watson *v.* Ramachund Dutt	I. L. R., 18 C., 20	97, 104
Westropp *v.* Elligott	9 A. C., 815	282
Whistler *v.* Forster, 32	L. J. C. B., 163	264
Willison *v.* Watkins	3 Peters at p. 43	102
Wilson *v.* Bates	3 My. & Cr. 197	306
Wise *v.* Rajnarain	I. L. R., 14 C., 26	230
Woomatara Debia *v.* Unnopoorna Dassee ...	11 B. L. R., 158	33, 35
Wright *v.* Robotham	21 L. J. C. P. 189	143
X.		
Xellar's Lessee, *v.* Eckhart	4 How, p. 296	101
Y.		
Young *v.* Adam	1898, A. C. 476	207,208,021

GENERAL INDEX.

Acts:— PAGE.

1839, XXXII :—*See* Interest Act.

1863, XX :—Religious Endowments Act.

1864, II (Madras) :—*See* Revenue Recovery Act (Madras).

1865, VIII (Madras) :—*See* Rent Recovery Act (Madras).

1870, VII :—*See* Court Fees Act.

1872, IX :—*See* Contract Act.

1873, IV :—*See* Civil Courts Act (Madras).

1874, II :—*See* Administrator-General's Act.

1875, XXIII :—*See* Limitation Act.

1876, XVII :—*See* Oudh Land Revenue Act.

1877, III :—*See* Registration Act.

1877, XV :—Limitation Act.

1887, I :—*See* General Stamp Act.

1882, V :—*See* Forest Act (Madras).

1882, VI :—*See* Companies Act.

1882, VI :—*See* Civil Procedure Code.

1882, XV :—*See* Presidency Small Cause Courts Act.

1884, I (Madras) :—*See* City of Madras Municipal Act (Madras).

1887, I (Madras) :—*See* Malabar Compensation for Tenants Improvements Act (Madras).

1887, IX :—*See* Provincial Small Cause Courts Act.

1889, VII :—*See* Succession Certificate Act.

Abandonment of a point by Vakil :—*See* Limitation Act (11).

Abatement of Suit :—*See* Civil Procedure Code (36).

Acknowledgment :—*See* Limitation Act (3).

——————— **by surviving partners** :—*See* Limitation Act (5).

Actio Personalis moritur cum persona :—*See* Civil Procedure Code (36).

Admission of document, finality of :—*See* Stamp Act (1).

Adoption :—*See* Hindu Law (2).

Adverse possession of tenant in common :—*See* Civil Procedure Code (11).

Agreement :—*See* Civil Procedure Code (28).

Alienation by widow with reversioner's consent :—*See* Hindu Law (13).

——— **of widow's estate** :—*See* Hindu Law (13).

Appeal :—*See* Provincial Small Cause Courts Act (2).

——— :—*See* Civil Procedure Code (4).

——— :—*See* Criminal Procedure Code.

——— **against ejectment order** :—*See* Rent Recovery Act (2).

Page.

Appeal against order under S. 102, C. P. C. :—*See* CIVIL PROCEDURE CODE (15).

——— **from order allowing withdrawal of suit and costs** :—*See* CIVIL PROCEDURE CODE (1).

Appellate jurisdiction :—*See* CIVIL PROCEDURE CODE (4).

Application :—

——— **for restitution** :—*See* CIVIL PROCEDURE CODE (20).

——— **under S. 311, C. P. C., withdrawal of** :—*See* CIVIL PROCEDURE CODE (16).

Attachment :—*See* HINDU LAW (9).

——— **by Civil Court** :—*See* INDIAN PENAL CODE (2).

——— **effect of** :—*See* CIVIL PROCEDURE CODE (32).

——— **of decree** :—*See* CIVIL PROCEDURE CODE (26).

——— **of mortgage bond as immoveable property** :—*See* CIVIL PROCEDURE CODE (18).

Auction-purchaser, right of :—*See* MORTGAGOR AND MORTGAGEE (4).

Benamidar—*Maintainability of suit.*

The plaintiff, assignee of a debt, sued the debtor for the money. It was proved that the assignment in favor of the plaintiff was really intended for the benefit of his master, whose money formed the consideration for the assignment.

Held, that the plaintiff was entitled to recover notwithstanding he was a mere benamidar.

Per curiam "Provided that the defendant is not in any way prejudiced and is allowed to raise any defence which would avail him against the person really entitled, there seems to be no objection to such a suit.

Sivasankaram Pillai v. *Panchami Kesiyar* 302

Benami transferee .—*See* CIVIL PROCEDURE CODE (22).

Bottomry, bond essentials of—*Hypothecation of ship—Uncertainty of contract—Yoggyam adamanam.*

A bottomry bond given by the owner of a ship must, to be valid, be given at a place where he has no personal credit or security other than the bond.

A bond hypothecating a ship after reciting the consideration and the security imposed a personal liability on the hypothecators for re-payment of the amount within a fixed time and stated that "if the money is not paid within the stipulated time we (the hypothecators) shall add vattam at Rs. 20 per cent. per annum on the amount of principal and interest accruing on that date, adding vattam once in the twelve months until date of payment, after the stipulated time, on the *adamana yoggyam* of the said ship and get back this mortgage bond."

Held, that the bond was not valid as a bottomry bond, and that as a mere hypothecation the provision therein contained for vattam on yoggyam of the ship were void for uncertainty, the word *yoggyam* being indefinite in its signification.

Asan Koothoo Sahib Mercoyar v. *Moothoo Kana Ana Ramanath Chetty* 159

Cause of action :—*See* HINDU LAW (8).

——— :—*See* RENT RECOVERY ACT (5).

Charter Act, S. 13 (24 & 25, Vic. Ch. 104) :—*See* CIVIL PROCEDURE CODE (4).

Page.

1. **Civil Procedure Code, Ss. 2, 54, 373, 588**—*Suit, withdrawal of—Appeal from order allowing withdrawal of suit and costs.*

The plaintiff in a suit applied to the Court for permission to withdraw it with liberty to bring a fresh suit in respect of the subject matter and the Court allowed the withdrawal, passing an order directing the plaintiff's costs to be paid out of certain funds of which the defendant was trustee. The defendant appealed objecting to the award of costs.

Held, that the order of the Court as to costs was not a decree within the meaning of S. 2, C. P. C., and not being an order mentioned in S. 588, C. P. C., was not appealable.

Ramakisoor Doss v. *Sreerangacharlu*... 74

2. ——————— **Ss. 2,244 and 310 (A)**.—*Mortgagee, whose immovable property has been sold.*

A. and B. who were joint owners of some property together mortgaged it to C. C. then sued on the mortgage and got a decree against them both. After decree A. sold away his share of the property to B. in consideration of the latter undertaking to pay the whole of the decree amount and executing to him a simple mortgage on the share so sold for the balance of the sale amount. Subsequent to this arrangement, C. executed his decree and purchased the entire property himself in execution. B. then applied to the court to have the sale set aside under S. 310 (A), C. P. C.

Held: that as B's mortgage would be affected by the sale, he was a person whose immovable property had been sold within the meaning of S. 310 (A), C. P. C., and that, consequently, he was entitled to the benefit of that section, and that as the purchaser was the decree-holder himself and the matter was one arising in execution, the order passed between him and another party to the suit under S. 310 (A) was appealable.

Rakhal Chunder Bose v. *Dwarka Nath Misser* from I. L. R., 13 C. 346, referred to.

Srinivasa Aiyangar v. *Aiyathorai Pillai* 55

3. ——————— **Ss. 2, 244, 583 and 588**—*Restitution of decree.*

An order passed under S. 583, Criminal Procedure Code, is applicable in the same manner as any other order passed in execution of a decree.

In giving restitution under S. 583, Civil Procedure Code, the Court should restore the parties to the original state of things which existed prior to the execution of the decree, and to that extent must enquire into and determine the right of the parties requiring restitution.

Vellanki Venkatarama Rao v. *Venkatasubbamma Rao* 276

4. ——————— **Ss. 2, 541, 543, 582**—*Rejection of appeal memorandum—Scandalous matter—Appeal—Scandalous matter, what—Partiality of Judge, ground of appeal.*

An appeal lies from an order rejecting an appeal memorandum on the ground that it contains scandalous matter. *Ayyanna* v. *Nagabhooshanam*, I. L. R., 16 M., 285, referred to.

Per Subrahmania Aiyar, J.—When a memorandum of appeal contains scandalous matter, the Court has no power to reject the memorandum especially in cases where the scandalous matter is separable from the rest. All that it can do is to ask the appellant to remove the objectionable matter, and if he should refuse to do so itself have it expunged.

Page.

Bias on the part of a Judge ought not to be allowed to form a ground of appeal for impeaching his decision. It is no doubt open to an appellant to set up circumstances showing that the Judge whose decision is appealed against was disqualified from trying and deciding the case. But it is not open to him to show that in the particular case he was biassed in fact.

Per Moore, J.—When a Court finds scandalous matter in an appeal memorandum which in its opinion should be *expunged*, the proper course for it to take is to return the appeal petition to the appellant and refuse to receive it until the matter is expunged. It is no part of its duty to revise the memorandum itself.

Zamindar of Tuni v. *Bangaru Peda Bennayya* 304

5. ———————— **S. 13**—*Joinder of causes of action closely connected—Settlement of accounts, suit on—Suit on pro-note given on settlement of account.*

The plaintiff first sued on pro-note executed to him by the defendant for money due on a settlement of accounts and alleged that the pro-note was contained in the plaintiff's account book stamped and signed by the defendant. The defendant denied execution and the suit was dismissed on the ground that the plaintiff failed to prove the genuineness of the pro-note. The plaintiff then sued the defendant on the settlement of accounts.

Held, that the second suit was barred by S. 12 of the Civil Procedure Code. *Arunachalam Chetty* v. *Meyyappa Chetty* I. L. R., 21 M. 91, followed.

Muruga Pillai v. *Subrahmania Aiyar* 197

6. ———————— **Ss. 13 and 43**—*Transfer of Property Act, S. 55—Suit for specific performance of contract to sell—Fresh suit for possession barred.*

In the absence of a provision in the contract to the contrary a person suing for the specific performance of a contract to sell land must also ask for possession in the same suit; otherwise a fresh suit for possession will be barred under Ss. 13 and 43, of the Civil Procedure Code.

Nathu Valad Pandu v. *Budhu Valad Bhika*, I. L. R., 18 M., 537, distinguished.

Narayana Kaviroyan v. *Kandasami Goundan* 147

7. ———————— **Ss. 13 and 43**:—*See* SPECIFIC RELIEF ACT (1).

8. ———————— **Ss. 13.** (*expl.* ii) **42, 43, 244, 462.**—*Res judicata—Cause of action—Compromise on behalf of minor without leave—Right of next friend to set aside compromise on behalf of minor.*

The next friend of a minor in a suit cannot validly compromise it without the previous sanction of the court enabling him to enter into such a compromise. The mere fact that a court passes a decree in accordance with an unauthorized compromise does not amount to leave being given within the meaning of S. 462, C. P. C.

The right to avoid a compromise entered into on behalf of a minor by his next friend in a suit, can be exercised not only by the minor himself on coming of age but also during his minority by a next friend on his behalf.

Page.

Explanation ii to S. 13, C. P. C., in authorizing a fiction that the matter contemplated by it was in issue necessarily implies the further fiction that it was adjudicated upon.

In 1879, a suit was compromised on behalf of (A), a minor by his next friend, but without the previous sanction of the court which, however, passed a decree in accordance with the compromise. In 1882, another next friend of A sued the same defendant to set aside the decree on the ground of fraud on the part of the person who had formerly acted as next friend. That suit was thrown out on the ground that no fraud was proved. In 1884, another attempt was made in execution, to impeach the same decree on the allegation that it had been obtained without leave.

The objection was there overruled on the ground that the sanction had been impliedly given.

In a suit by A. in 1896, within three years of his attaining his majority, to set aside the compromise decree on the ground that it had been obtained without leave of court and was, consequently, not binding on him:

Held that S. 244 was no bar to the suit as the question whether sanction was given or not, being one going to the very root of the decree passed on the compromise, was such as could not be raised in *execution* of the decree;

that the cause of action alleged in the present suit was either identical with or formed part of the cause of action put forward in the suit of 1882, and was, therefore, matter which ought to have been made a ground of attack in the former suit and that, consequently, the present suit was barred as *res judicata*.

Arunachalam Chetti v. *Meyyapa Chetty* 28

9. ———————— **Ss. 17, cl.** (c) **and 20.**—*Acquiescence to jurisdiction by non-resident defendant—Non-resident defendant must apply to stay proceedings.*

Where a suit is instituted against two persons in court within whose jurisdiction the cause of action has not arisen, but where one of the defendants resides, the non-resident defendant must, if he wishes the suit to be tried by any other court, apply under S. 20, C. P. C., to stay proceedings; otherwise, he will be deemed to have acquiesced in the institution of the suit in the court in which it is filed; it is not enough if he only objects to the jurisdiction in his written statement.

Viraragava v. *Krishnasami*, I. L. R., 6 M., 344, followed.

Ismall Peer Ambalam v. *Neelamegam Servai* 3

10. ———————— **S. 31.**—*Tenants-in-common, suit by—Non-joinder, effect of—Torts—Joinder of parties.*

One tenant-in-common can sue a trespasser in tort without making the other tenants parties and get relief so far as he is concerned.

The plaintiff and S. B. were both entitled as tenants-in-common to the mortgagee's interest under a usufructuary mortgage-deed in the rates of two-thirds and one-third of it respectively. The 2nd and 3rd defendants who were the mortgagors were in possession under a rental agreement and the mortgage-deed stood in the name of the 1st defendant benami for the plaintiff. On the 1st defendant denying the plaintiff's title to the mortgage the plaintiff instituted a suit for a declaration that he was the owner of the mortgage.

Page.

Held: that the plaintiff was entitled to a declaration so far as his two-thirds share in the mortgage was concerned without making S. R. party to the suit.

Obiter: In the case of property indivisible one co-owner alone can recover it from a person who holds unlawful possession of it.

The law as to the effect of non-joinder in English well as in Indian Courts discussed.

Mahabala Bhatta v. *Kunhanna Banta* 139

11. ———————— **S. 43**.—*Limitation Act, XV of* 1877, *Sch. II, Arts.* 142 *and* 144—*Adverse possession of—Tenant-in-common—When tenant's possession adverse to landlord.*

Where two persons are tenants in common of various items of properties, and one of them has obtained decrees for partition of some of the items in suits to which the other tenant-in-common and tenants holding the properties under them were parties, S. 43 does not bar a fresh suit by the same plaintiff for partition of the remaining items.

Per Shephard, J.—The causes of action are not the same in the former and the present suits, because the right on the part of a tenant-in-common to have each field separately divided between himself and his co-tenants is one thing and the right to claim a partition of all the fields held by them as tenants-in-common is another thing.

Per Subramania Aiyar, J.—The cause of action relied on in the previous suits though erroneous, being that the plaintiff was entitled, to a partition confined to the particular parcels comprised in the demises to the tenants who were impleaded in each suit, was different from that upon which the present suit was based, namely, to a general and complete partition of the entire property held by the plaintiff and the defendant.

Per Shephard, J.—Where property was in possession of two persons as tenants—in—common and held under them by a tenant, mere non-participation of the profits by one of the owners and exclusive occupation by the other is not sufficient to make a case of adverse possession. Even where the original tenant and a member of his family attorns to one of the owners or a stranger pays off the former tenant and attorns to such owners, the possession of the tenant and of such owner is not adverse to the other owner unless the tenancy has been determined in the one case or the other owner has notice of the adverse possession in the other. Mere denial of a landlord's title does not determine the tenancy unless the landlord does some act showing his election to accept the forfeiture.

Per Subramania Aiyar, J.—During the subsistence of a tenancy, assertion of title by the tenant does not render his possession adverse. Such assertion after the determination of his tenancy or attorning and paying rent to a stranger who asserts title, makes the possession adverse, provided the owner has knowledge of the facts. In the case of tenants in common there is no ouster of adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

Kuthiravattah Nair v. *Manvikrama* 92

12. ———————— **Ss. 43 and 44**—*Conversion, what amounts to—Cutting timber trees—Mesne profits.*

Plaintiff first sued the defendant and obtained a decree for possession of a hill from which he had been evicted and for dam-

Page.

ages caused by the defendant having cut and removed certain trees from the hill. He then sued the defendant for damages in respect of trees that had been cut and removed by the defendant subsequent to the institution of the previous suit and in respect of a quantity of timber which had been stored by the plaintiff on the hill and removed by the defendant also subsequent to the institution of the first suit.

Held: that the second suit was maintainable and was not barred under S. 43, Civil Procedure Code, by reason of the first suit.

See also MESNE PROFITS AND CONVERSION.

Thottathil Ahmmad v. *Muthedath Avuthraman* 273

13. ——————— **S. 54**:—*Alternative prayers in Plaint—Plaint insufficiently stamped—Court cannot reject without first requiring proper stamp to be paid.*

The plaintiff sued to redeem a kanom (mortgage) of 1858, and alleged in his plaint that the defendants were setting up a renewal of 1874, which was not, however, binding on the plaintiff. He paid court-fees on the amount of the mortgage admitted by him and added an alternative prayer that if the Court should find the renewal of 1874 to be valid, he might be allowed to redeem on the footing of that renewal. The District Munsif decreed the suit, but the District Judge on appeal found that the renewal of 1874 was binding on the plaintiff and dismissed the suit, inasmuch as he had not paid court-fees on the amount of that renewed kanom, but only upon the kanom of 1850, which was for a less sum.

Held: that the dismissal of the suit was improper. and that the proper course for the Judge was that provided for by S. 54, Civil Procedure Code, *viz.*, to require the plaintiff to pay the additional stamp necessary to cover the larger amount and in default to reject the suit.

Subrahmania Pattar v. *Valiya Nyar* 187

14. ——————— **Ss. 80, 101, 108, 588**—*Ex-parte decree, effect of setting aside—Summons, serving of—Summons, when affixable to the outer door.*

After he was declared *ex parte*, the defendant in a suit applied under S. 101. Civil Procedure Code, to be heard in answer to the suit. The application was rejected and a decree *ex parte* was passed against him. He then applied under S. 108, C. P. C., to set aside the *ex parte* decree, and this was also refused. Against this latter order, he preferred an appeal under S. 588, C. P. C.

Held: that, notwithstanding the dismissal of his application under S. 101, C. P. C., the defendant was entitled to apply under S. 108, C. P. C., to set aside the *ex parte* decree; and

that the effect of setting aside the *ex parte* decree under S. 108, C. P. C., was to nullify the order that had been passed under S. 101, C. P. C., so as to allow the defendant to appear and defend the suit.

If in the course of serving a summons to the defendant in a suit, the serving officer receives information that leads him to think that the defendant is only temporarily absent, he must wait and effect a personal service. But if it be otherwise, and if there be no person who can be served in the absence of the defendant, there is nothing improper in the officer's affixing a copy of the summons to the outer door of the defendant's residence.

Bhomshetti v. *Umabai*, I. L. R., 21 B., 223, referred to.

Sankaralinga Mudali v. *Rathnasabapathi Mudali* 58

Page.

15. ———— **Ss. 102, 103.**—*Dismissal for default—Appeal against order under S. 102.*

An order passed under S. 102 of the Civil Procedure Code is not a decree from which an appeal or a second appeal lies.

Gilkinson v. *Subrahmania Aiyar* 287

16. ———— **Ss. 310 (A) and 311.**—*Withdrawal of application under S. 311—Compliance with S. 310 (A).*

A judgment-debtor whose immovable property had been sold in execution applied under S. 311, C. P. C., to set aside the sale. Immediately after and within the 30 days allowed by law, he applied also under S. 310 (A) depositing the amounts referred to in cls. (*a*) and (*b*) of that section. When the petitions were first called on for hearing, he withdrew the former and elected to proceed with the latter.

Held: that he was entitled to do so as, under the circumstances, the matter must be treated as if no application had been made under S. 311, C. P. C.

Venkata Krishnayya v. *Narasimham* 66

17. ———— **S. 158.**—*Costs, failure to pay.*

Where at the request of a petitioner the Court adjourns the case ordering him to pay the costs of adjournment to the counter-petitioner and the former does not pay it, the Court cannot dismiss the petition under S. 158, C. P. C., unless it had made the payment of costs a condition precedent to hearing the evidence in the case.

Veerabadhrappa Chetty v. *Chinnammah* 189

18. ———— **Ss. 223, 268, 269, 274**—*Transfer of decree for execution to another court—Transfer order obtained by misrepresentation, mere irregularity—Irregularity—Attachment of mortgage-bond as immovable property merely.*

A decree-holder applied to the court which passed the decree to transfer it for execution to another court and in support of the application made a false representation that property of the judgment-debtor was to be found within the jurisdiction of that other court. The court without making any enquiry under S 223, C. P. C, ordered the transfer. The court to which the decree had thus been transferred executed it, and in execution thereof attached and sold a mortgage-bond of the judgment-debtor in the custody of a third person, in the manner provided for by the Civil Procedure Code for the sale of moveable property. The decree-holder himself purchased the bond and instituted a suit upon the bond. On objection stated by the mortgagor that the transfer of the decree and the sale in execution thereof were illegal and void;

Held: that the fact that the original court was misled into making the order of transfer did not vitiate the validity of the order;

that the omission to attach the mortgage-debt as immovable property under S. 274 was a mere irregularity.

and that, inasmuch as the bond itself had been attached and sold the sale operated as a valid transfer of the mortgage security to the plaintiff.

Achemma v. *Basappa* 1

19. ———— **S. 230.**—*Fraud of judgment-debtor preventing execution—Execution after 12 years from date of decree—Fraud, meaning of—Application for warrant of arrest, and application for attachment of immovable property different from each other,*

Page.

In order to bring a case within the proviso to S. 230, Civil Procedure Code, it has to be proved—(1) that the judgment-debtor used stratagems designed to prevent execution of the decree, and (2) that the execution of the decree was by such means prevented.

It is not enough to prove fraud at some time during the 12 years. It must be proved that the non execution of the decree was brought about by the fraud complained of.

Assuming that an application made before the expiration of the 12 years' period may, notwithstanding S. 230, C. P. C., be granted after the lapse of that period, still a decree-holder cannot, on account of the pending of a prior application for warrant of arrest, be allowed, after the lapse of the 12 years, to make another application for the attachment of immovable property, inasmuch as the two applications are entirely different and distinct from each other.

Seshachalam Chetty v. *Rajam Chetty* 203

20. ———— **Ss. 230, 583.**—*Restitution, execution of decree for—Limitation Act, Sch. II, Art. 179—Restitution barred after* 12 *years.*

Applications made to obtain restitution under a decree in accordance with S. 583, C. P. C., are proceedings in execution, and as such are governed by the rules of limitation prescribed by S. 230, C. P. C., and Art. 179, Sch. II, of the Limitation Act, XV of (1877).

Nand Ram v. *Sita Ram*, I. L. R., 8 A., 545, followed; *Kurupam Zamindar* v *Sadasiva*, *Ib.* 10 M., 66, distingushed

Venkayya v. *Raghavacharlu* 79

21. ———— **S. 231.**—*Joint decree-holders—Execution by one alone—Judgment-debtor has no right to object.*

Where a decree is passed in favor of more persons than one, any one of them can execute the whole decree subject to the rights of the other decree-holders being protected by order of Court. The judgment-debtor has no right whatever to object to such execution being allowed.

Krishnappa Holla v. *Savitri* 91

22. ———— **Ss. 232, 244.**—*Transferee—decree-holder's right to execute—Benami transferee—Contest between benami transferee and real transferee as to the right to execute decree.*

Where a question arises in execution proceedings as to who is the real transferee of a decree, the Court may under S. 244, C. P. C., either decide the question then and there, or refer the parties to a separate suit for a decision thereon.

Notwithstanding the form of the transfer, the real transferee of a decree may apply to execute it under S. 232, C. P. C.

Once an executing Court, in the exercise of its discretion, decides upon allowing the transferee to execute a decree, it has no further discretion to choose as between the benamidar and the real transferee of the decree. The real transferee must be put on the record in preference to the benamidar. The mere fact that the benami transferee had been allowed to execute a decree under S. 232, C. P. C., does not debar the real transferee from applying afterwards under the same section to be allowed to carry the further execution of the decree.

Manickam v. *Tatayya* 48

Page.

23. ——————— S. 244.—*Order referring question as to who is the legal representative to a separate suit—Hindu Law—Decree for partition, effect of, on survivorship.*

When a question arises as to who is the legal representative of a party to a decree for purposes of execution, and the court executing the decree passes an order staying execution thereof and referring the claimants to a regular suit for the purpose of determining their respective claims to represent the deceased, such order falls under S. 244, C. P. C., and is, therefore, appealable.

See PARTITION.

Chinnathal v. *Virutsacha Pillai* 37

24. ——————— Ss. 234, 244, 298.—*Sale of judgment-debtor's property after judgment-debtor's death.—Validity of non-joinder of representative.*

A sale of movable property (debt) held in execution of a decree is void, where at the time of the actual sale, the judgment-debtor is dead and his legal representatives are not brought to the record, even though the order to sell may have been passed before the judgment-debtor's death. Failure to bring in the legal representatives under such circumstances is not a mere irregularity covered under S. 298, Civil Procedure Code, but the sale of the deceased judgment-debtor's property without his legal representatives on the record is void *ab initio*.

Groves v. *Administrator-General* 288

25. ——————— S. 244.—*Questions relating to execution of decree between auction-purchaser and judgment-debtor.*

An order passed in execution of a decree and which decides a dispute which concerns only the judgment-debtor on the one hand, and the auction-purchaser on the other, is not to be deemed an order passed under S. 244, C. P. C., and is, therefore, not appealable.

Under a mortgage-deed a plot of land and certain buildings thereon were mortgaged. The mortgagee got a decree on his mortgage and in execution of that decree the properties were purchased by a third person. But before the certificate was issued to him disputes arose as to whether the land alone was sold as contended for by the judgment-debtor or whether the buildings also were included in the sale as contended for by the auction-purchaser. The Court after hearing all the parties including the decree-holder passed an order to the effect that all the mortgaged properties were sold.

Held: that no appeal lay from this order as it was one which affected only the auction-purchaser and the judgment-debtor and as such was not falling under S. 244, C. P. C.

Prosunno Coomar Sanyal v. *Kasi Dass Sanyal* 19 I. A., 166 distinguished.

Mithala Cheruvittil Mammod v. *Locke* 7

26. ——————— Ss. 244, 273, 311, 312, 588.—*Attachment of decree—Person attaching not party to the decree.*

Although by attachment of a decree belonging to his judgment-debtor, a decree-holder becomes entitled under S. 273, Civil Procedure Code, to execute the decree attached, he does not thereby become a party to or transferee of the attached decree within the meaning of S. 244, Civil Procedure Code.

K. in execution of a decree which he obtained against S. attached a decree belonging to S. under S. 273, Civil Procedure Code. The decree attached was then executed and some

Page.

properties were brought to sale in such execution. S. thereon applied to the Court to set aside the sale on various grounds but his application was refused.

Held: that against that order, S. was not entitled to appeal under S. 244 Civil Procedure Code, but that he had a right of appeal under Ss. 312 and 588, Civil Procedure Code.

Sami Pillai v. *Krishnasami Chetti* 77

27. ——————— **Ss. 244 and 311.**—*Partial review, effect of—Irregularities in the execution of revised decree affecting parties to the original decree.*

A decree for sale of certain items of property was made against twelve defendants, of whom the 12th defendant was in possesion of item 6 of the properties ordered to be sold. Subsequently, the 11th defendant applied for a review and the Court passed a revised decree so far as he was concerned. The decree-holder then executed that portion of the original decree not affected by the review, and in the course of that execution certain irregularities were committed which prejudiced the 12th defendant in the sale of item 6. In a suit by the 12th defendant for setting aside the sale on the ground of material irrigularities.

Held: that the review did not nullify the old decree; but that must be taken to have added certain amendments though the two decrees may be on separate pieces of paper; and

that, consequently, the matter was one which ought to be enquired into in execution under Ss. 244 and 311, Civil Procedure Code, and that no separate suit lay.

Manakkal Bhattathiripad v. *Mannakkal Damodaran* ... 115

28. ——————— **Ss. 244 and 318.**—*Decree-holder auction purchaser—Agreement between auction-purchaser and judgment-debtor not to take possession of property—Question arising in execution of decree.*

Where a decree-holder himself purchases the judgment-debtor's property in execution, and after such purchase enters into an agreement with the judgment-debtor not to take possesion of the property for consideration received.

Held: that in an application by such auction-purchaser under S. 318 of the Civil Procedure Code, to be put in possession the validity or otherwise of the agreement can be enquired into and decided as a matter arising in execution under S. 244, Civil Procedure Code,

Muttia v. *Appasami*, I. L. R., 13 M., 504, followed.

Baluswamy v. *Lakshmanan*, ... 193

29. ——————— **S. 253.**—*Liability of person becoming liable, pending suit—Decree not executable against surety.*

Where, pending a suit, a person executes a security-bond to the court under which he guarantees the production by the defendant in the suit of certain debt-bonds whenever called upon to produce them and agrees on failure thereof either himself to produce them or pay their value.

Held: that the security-bond thus executed does not fall under S 253, C. P. C., and that a decree passed in favour of the plaintiff in the suit cannot be executed against such a surety under that section.

Narayanamma v. *Ramayya Chetti* 199

Page.

30. ———— S. 258.—*Limitation Act, sch. III, Art. 173 (A)—Decree for surrender of property.*

S. 258 of the Civil Procedure Code is applicable only to decrees under which money is payable and has no application to other kinds of decrees.

A decree directed the surrender of certain property by the defendant to the plaintiff. The defendant surrendered the property accordingly and applied to the Court more than 90 days after the date of the surrender to enter up satisfaction.

Held: that the defendant's application was not governed by S. 258, Civil Procedure Code, and that, therefore, the limitation of 90 days prescribed in Art. 173, Limitation Act, in regard to that section had no application; and

that the Court executing a decree had power under the provisions of S. 244 to enquire into and pass order on such applications.

Sankara Nambiar v. *Kanara Kurup* 175

31. ———— S. 258.—*Payment out of court—Remedy of judgment-debtor—Separate suit not barred.*

A decree was satisfied out of court by payment. The decree-holder failed to certify the payment to the court as required by S. 258, C. P. C.; and the judgment-debtor too failed to apply to the court within the time limited. The decree-holder then applied to execute the decree, and the court allowed him to realise the decree-amount in execution overruling the objections of the judgment-debtor as made beyond time. The judgment-debtor then filed a suit for damages against the judgment-creditor for not certifying the payment to the court.

Held: that the suit was maintainable and that neither S. 244 nor S. 258 was a bar to it.

Guruvayya v. *Vudayappa*, I. L. R., 18 M., 26; *Rama Ayyan* v. *Sreenivasa Pattar*, *Ib.* 19 M., 230, distinguished.

Periatambi Odayan v. *Vellaya Kavundun* 5

32. ———— S. 276.—*Attachment, effect of—Attachment does not affect equitable rights enforceable against the property on the date of the attachment.*

An attachment of property under the Civil Procedure Code does not effect subsisting equitable rights which could be enforced against the property at the date of the attachment.

The plaintiff contracted with A in August, 1891, to take a mortgage of his property and advanced money under the contract, but took no registered instrument for the same. In September 1891, the property was attached in execution of decree against A. In December 1891, the plaintiff took a registered mortgage-bond for the sum he had already advanced in August, 1891.

Held: that as the plaintiff had at the date of the attachment an enforceable contract in respect of the attached property the rights enforceable under the attachment do not override his contract, and that a purchaser of the attached property in execution takes it subject to the plaintiff's mortgage, although the registered instrument was actually executed pending the attachment.

Savithri Ammal v. *Ramasami* 266

33. ———— S. 310 (A).—*Right of prior mortgagee to be paid out of sale-proceeds—Prior mortgagee not decree-holder—Decree, construction of.*

Page.

A mortgagee sued his mortgagor and others who had prior charge on the property for his debt and obtained a decree which directed that the mortgaged property be sold and out of the sale-proceeds the prior charges be first paid and then the mortgagee-debt of the plaintiff. The mortgagee-debt amounted to a sum of Rs. 8,127. The property was sold and purchased by the plaintiff himself for Rs. 1,379 which he paid into Court. Immediately after, the holder of one of the prior charges who was also a subsequent mortgagee paid the decree amount and 5 per cent. on the purchase-money in court and had the sale set aside under S. 310 (*a*). The plaintiff thereupon applied for the refund of his purchase-money.

Held: that he was entitled to a refund of the whole sum without any deduction being made on account of the prior charges, in as much as these charges had according to the decree to be paid out of the sale-proceeds alone, and there were no sale-proceeds, the sale itself having been set aside.

Chidambaram Chettiyar v. Rama Row 135

34. ———————— **Ss. 310 A and 315.**—*Refund.*

When a sale of immovable property is set aside under S. 310-A, the auction-purchaser who had paid the purchase-money and interest is entitled to recover it from a decree-holder of the judgment-debtor who had attached the money in the hands of the Court and received it.

Veerasamy Chetty v. Liladhara Vyass 110

35. ———————— **S. 315.**—*Right of auction-purchaser to recover purchase-money in a suit—Previous application in execution to recover purchase-money—Suit not barred.*

An auction-purchaser whose sale has been set aside may recover his purchase-money in a regular suit, although he might have, previous to the suit, ineffectually made an application under S. 315, Civil Procedure Code, provided that the matter has not been made *res judicata* in that prior application.

(*Munna Singh* v. *Gajadhar Singh* I. L. R., 5 A., 582, referred to —vide *Sundara Gopalan* v. *Venkatavarada Aiyangar*, *Ib.* 17 M., 228.)

Changa Ram v. *Narayani Ammal* 194

36. ———————— **Ss. 361, 368,** *actio personalis moritur cum persona—Abatement of suit.*

The plaintiff as the superintendent of a temple sued the senior jaiyyangar, an officer of the temple, for loss of income and for expenses caused to the temple by his refusal to give up the keys of the temple and have worship duly performed therein. Pending the suit, the defendant died, and his successor in office was brought in as his legal representative. It did not appear that the deceased left any personal assets, or that his estate benefited by his misconduct.

Held: that the cause of action against the deceased defendant was purely personal and that with his death it came to an end and did not survive against his legal representative, and that the suit should consequently abate.

Satagopa Ramanuja v. *Mahabir Dossji* 180

37. ———————— **Ss. 412 and 622.**—*Withdrawal of suit by a pauper—Payment of stamp duty to Government.*

The word 'fails' in S. 412, C. P. C., is not restricted to cases of failure after contest, but also includes cases where a pauper plaintiff has his suit dismissed after a compromise.

Page.

After the institution of his suit a pauper plaintiff compromised his case with the defendant and requested the court to dismiss the suit.

Held: that the court in dismissing the suit ought to pass an order for the payment of court-fees under S. 412, C. P. C., and that an order which does not provide for such payment is liable to be revised under S. 622, C. P. C.

Collector of Vizagapatam v. *Abdul Kharim Sahib* 4

38. ———— **S. 539.**—*Powers of trustee, appointed by Committee under Act XX,* 1863—*Appointment of new trustee—Misappropriation of trust fund.*

A general trustee of a temple appointed by the Devastanam Committee under Act XX of 1863 is entitled to resort to the ordinary courts to obtain all appropriate reliefs for the protection of the interests of the temple without having recourse to the special procedure prescribed by S. 539, Civil Procedure Code. *Jeyangarulavaru* v. *Sri Hari Durma Dossji*, 4 M. H. C. R., 4, followed.

The plaintiff was the general trustee of a temple appointed by the Committee under Act XX of 1863. The defendants were the representatives in interest of a sub-trustee of a certain endowment or kattalai in the temple. The sub-trustee had misappropriated the funds of the endowment and died without recouping the endowment. The plaintiff then instituted a suit in the Court of a Subordinate Judge against the defendants for the recovery of the funds mis-appropriated and for the appointment of a new trustee for the kattalai:—

Held: that the suit was maintainable as it was found in the Sub-Court, and that S. 539, Civil Procedure Code, was no bar.

Per curiam:—S. 539 Civil Procedure Code, is intended to apply to persons who before its enactment had, or were believed to have, no right to take proceedings for the purposes mentioned in the section, and in their case the limitation requiring previous sanction for the suit was one that was necessary to prevent an abuse of the powers conferred.

Nellaiyappa Pillai v. *Thangama Nachiyar* 119

39. ———— **S. 574.**—*Judgment, contents of.*

A District Judge on appeal from the decision of a District Munsif in a particular case referred to the facts and said, "I concur in the decision which the District Munsif has given on each point. The judgment of the lower court is confirmed for the reasons therein set forth; and this appeal is dismissed with costs:"

Held: that this was not a judgment in accordance with law as laid down in S. 574 of the Civil Procedure Code, and that the Judge should re-write his judgment in accordance with the provisions of S. 574.

Per curiam:—"The judgment of the appellate court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them."

Sitharama Sastrulu v. *Suryanarayana Sastri* 183

40. ———— **S. 586 and 622.**—*Suit on bond executed by manager of a Hindu family—Suit of a small cause nature—Pro. Small Cause Court's Act, Sch. ii, Cl. 19.*

A suit against the members of a Hindu joint family on a bond executed by the managing member of the family for Rs. 500 and borrowed for family purposes is a suit of a small cause nature, and no second appeal lies in such a suit.

Page.

See also PROVINCIAL SMALL CAUSE COURTS ACT (3).

Srinivasa v. *Sivakolundu*, I. L. R., 12 M., 349, referred to.

Revur Subba Row v. *Papi Reddy* 149

41———————— Ss. 588,591,622.—*Revisional jurisdiction appellate jurisdiction—Letters Patent, cl. 15and 36—The Charter Act, S. 13 (24 and 25 Vic. ch. 104).*

Per *Shephard*, O. C. J., *Subrahmania Aiyar, Benson* and *Moore*, J. J. The powers of revision exercised by the High Court under S. 622, Civil Procedure Code, forms part of its appellate jurisdiction within the meaning of S. 13 of the Charter Act and cl. 15 and 36 of the Letters Patent.

Per *Shephard*, O. C. J., *Subrahmania Aiyar, Boddam* and *Moore*, J. J. An appeal lies against an order passed by a single Judge of the High Court under S. 622, Civil Procedure Code, when such order amounts to a judgment within the meaning of clause 15 of the Letters Patent.

Per *Davies*, J.—When a single Judge of the High Court passes an order admitting or rejecting an application for revision under S. 622 of the Code, no appeal lies against that order.

The power of revision exercised by the High Court does not form part of its appellate jurisdiction.

Under the rules framed by the High Court a single Judge can admit or reject an application for revision; but when such application has been admitted, it must be heard and determined by a Bench of two Judges (Rule 2, clause III). Where, therefore, a single Judge hears and determines an application for revision on the merits, the order passed by him is passed without jurisdiction, and an appeal lies against that order; that being the only remedy for cancelling such order.

Per *Benson*, J.—No appeal under S. 15 of the Letters Patent lies against any order passed by a single Judge of the High Court under S. 622, Civil Procedure Code, the Letters Patent being controlled and limited by Ss. 588 and 591, Civil Procedure Code.

Per *Boddam*, J.—S. 15 of the Letters Patent is controlled by the Civil Procedure Code, but only to this extent that in the case, namely, where the order passed by a single Judge does not amount to a judgment, whereby the rights of the parties are concluded there is no appeal; but where this is the case the order amounts to a judgment within the meaning of S. 15 of the Letters Patent (3 M. H. C. R. 384) and an appeal lies.

Chakkara Chappan v. *Moidin Kutti* 231

Commissioner's certificate :—*See* RULES OF PRACTICE.

Compromise of suit.—*Compromises, conditional and absolute—Procedure to be adopted in case of a conditional compromise.*

The parties to a suit filed a razinamah, one of the terms of which was that the Court should pass a decree in accordance with it. The razinamah did not give the plaintiff any of the reliefs claimed in the suit, but dealt with various matters not the subject-matter of the suit.

Held : that the suit should not be dismissed because the razinamah could not be embodied in a decree, and that the proper course for the Judge is to inform the parties of the fact and to ascertain from them or upon further evidence, if necessary, whether the compromise was intended to be absolute or conditional on its being incorporated in a decree. In the latter case the Judge should proceed with the suit.

Odayana Tever v. *Thandavaraya Thambiran* 301

Page.

Compromise, power to, by Vakils :—*See* VAKILS.

Compromise, revocation of, by next friend on behalf of minor :—*See* CIVIL PROCEDURE CODE (8).

Construction of statute :—*See* LANDLORD AND TENANT (3).

Consent subsequent :—*See* HINDU LAW (2).

Contract Act, Ss: 73—*Ill.* (*q*), 151, 152, 161—*Contract, breach of—Damages too remote. Indian Railways Act IX of* 1890, *S.* 72.

The plaintiff, a tailor, with a view to making profits by sale of coats and other wearing apparel at a festival at K, entrusted the defendants (Railway Company) with a sewing machine, a bundle of clothes at E. to be carried from that place and delivered to him at K. The plaintiff, however, did not inform the Company as to who or what he was, or why the articles were being sent. The goods were, however, delayed in the despatch by the negligence of the Company's servants, and they did not reach K. till after the festival was over. In a suit by the plaintiff for damages sustained by the breach of contract:

Held: that (1) the trainage expenses of the plaintiff and his agent from E. to K and back; (2) expenses for their lodgings at Karamadai; and (3) rent paid for a shop engaged by them for the purpose ofcarrying on business;

were not recoverable, as being damages too remote;

and that the falling off in value of the cloth due to its not having been delivered in time to be utilised at the festival at K. was "deterioration" within the meaning of S. 72, Ind. Rail. Act IX of 1890; but that since there was no allegation or proof of any such deterioration the plaintiff could not recover any damages.

The Agent and Manager. M. R. Co. v. *Govinda Row* 85

Contribution :—*See* MORTGAGE.

Conversion :—In the case of land which is cultivated by growing saleable timber, profits made by a person in possession by cutting timber and selling them is mesne profits.

See also CIVIL PROCEDURE CODE (12).

Thottathil Ahmmad v. *Muthedath Anutharaman* 273

Costs, failure to pay :—*See* CIVIL PROCEDURE CODE (17).

Cowle, grant of :—*See* MALABAR LAND TENURE.

Criminal Procedure Code, S. 146—*The Indian Penal Code, Ss.* 188, 447—*Trespass upon property under attachment of Magistrate—Criminal Trespass.*

Disobedience to an order passed by a Magistrate under S. 146 of the Criminal Procedure Code is not an offence falling under S. 188 of the Indian Cenal Code and is not punishable as such.

A person who trespasses upon and cultivates immovable property which has been attached by a Magistrate under S. 146 of the Criminal Crocedure Code commits the offence of criminal trespass, and he is liable to be punished under S. 447 of the Indian Cenal Code.

Nagoji Ramachandra v. *Queen-Empress* 253

Damages, too remote :—*See* CONTRACT ACT.

Decree, Exparte, effect of setting aside :—*See* CIVIL PROCEDURE CODE (14).

—— for surrender of property :—*See* CIVIL PROCEDURE CODE (30).

—— to date of plaint, relation of :—*See* EJECTMENT SUIT.

Page.

District Municipalities Act IV of 1884, S. 53—*Professional tax—Exercise of profession, meaning of.*

A contractor whose permanent place of residence was within the municipal limits of Srivilliputtur entered into a contract with the Department of Public Works whose office was also situated within the said municipal limits for the purpose of carrying on some works outside the Municipality. The contract was executed within the town; instructions to the contract were given him there, and money was to be paid him only there. Bnt the works were executed outside the Municipality, and the contractor for that purpose lived temporarily at the place where the work was being carried on.

Held: that under those circumstances the contractor *exercised his profession* within the Municipality within the meaning of S. 53, Madras Act, IV of 1884, and was, therefore, liable to be taxed.

Ramasami Ayyar v. *Municipal Council of Salem*, I. L. R., 18 M., 183, referred to.

Municipal Council of Srivilliputur v. *Chinaboothanayagam Pilli.* 73

Education:—*See* MALABAR LAW.

Ejectment suit.—*Suit by lessor during continuance of lease—Possession during lease.*

A. granted a lease of his melvaram right in an inam village to B. for two faslies (1304 and 1305). C. ousted the lessee from possession claiming a right in himself for the same. A then instituted a suit against B. and C. in ejectment during the continuance of the term of the lease. Pending the suit the lease expired. The plaint contained no prayer for a declaration of A.'s right.

Held: that in every suit the decree only settles the rights of the parties at the date of the plaint;

that as at the date of the plaint A. was not entitled to possession, his suit was premature and unsustainable; and

that no declaration can be given to A. of his right, inasmuch as he had not prayed for the same in the plaint.

Ramanathan Chetti v. *Pulikutti Servai* 121

Equity of Redemption, fetter on:—*See* MORTGAGOR AND MORTGAGEE (3).

1. Evidence Act, Ss. 91 and 92:—*See* STAMP ACT (3).

2 ———— S. 92, proviso 4—"*Oral*" *agreement—Meaning of—Agreement in writing registered, variation of.*

The expression 'oral agreement' in S. 92 of the Indian Evidence Act is intended to cover all unwritten agreements, whether come to by word of mouth or implied by conduct or otherwise. The defendant had taken a lease of certain lands belonging to plaintiff under a registered instrument of 1878, which prescribed an annual rent of Rs. 106. This rent was being paid till 1886, and from that time till the institution of the suit in 1895, only Rs. 50 were paid and accepted as the rent payable per annum. In a suit by plaintiff for rent according to the rate prescribed in the registered instrument,

Held: that any variation of it by subsequent conduct cannot be proved and that the plaintiff was entitled to the relief claimed.

Mayandi Chetti v. *Mrs. Oliver* 196

Evidence, admissibility in:—*See* INDIAN STAMP ACT (2).

Page.

Execution :—*See* CIVIL PROCEDURE CODE (21).

——— **applications, practice of striking off, illegal** ;—*See* LIMITATION ACT (15).

——— **by one of many joint decree-holders** :—*See* CIVIL PROCEDURE CODE (21).

——— **purchase, interest acquired by** :—*See* MORTGAGE.

Execution, renewal of application for :—*See* LIMITATION ACT (14).

"Final decree," meaning of ;—*See* PROVINCIAL SMALL CAUSE COURTS ACT (2).

Foreign note :—*See* INDIAN STAMP ACT (2).

"Fraud," meaning of :—*See* CIVIL PROCEDURE CODE (19).

General Clauses Act, S. 10 :—*See* RENT RECOVERY ACT (4).

General Clauses Act, (Madras), S. 11 :—*See* RENT RECOVERY ACT (4).

Gift by widow :—*See* HINDU LAW (4).

——— **validity of** :—*See* HINDU LAW (5).

Gifts, religious :—*See* HINDU LAW (4).

Grounds of appeal :—*See* CIVIL PROCEDURE CODE (4).

Guardian and Wards Act, S. 7.—*Hindu mother—Power to appoint guardian by will.*

A Hindu mother is not entitled to appoint a guardian by will of her minor adopted son. In appointing a guardian to such a minor, the Court may take her wishes into consideration as to who may be so appointed.

Venkayya v. *Venkata Narasimhulu* 112

1. **Hindu Law**:—*See* CIVIL PROCEDURE CODE (23).

2. ———*Adoption to last owner's son—Vesting of estate in undivided brother—Subsequent consent of those affected by adoption.*

An undivided Hindu family consisted of R. and his brothers, and R.'s son S. S. died first leaving a widow and having authorized her to adopt; R. died next leaving his brothers survivors to the family estate. The widow of S. then adopted a son to her husband S. and the adoption was approved of by some of the brothers in whom the property had vested.

Held: that the adoption was invalid, not having been made to the last male owner and that the consent of some of the brothers would not validate the adoption.

Annammah v. *Mabbu Bali Reddy*, 8 M. H. C., 108, referred to.
Rathna Mudaliar v. *Ragunadha Bhattar* 173

3. ———*Debt by manager of Hindu family—Contribution, suit for—Indian Limitation Act, Art. 61.*

Where the manager of a Hindu family borrows and spends a debt for family purposes and is afterwards compelled by the creditor to repay the whole amount, a suit by him for contribution against his co-parceners is governed by Art. 61 of the Limitation Act, and the cause of action arises when the money is actually repaid by him.

Tirupatiraju v. *Rajagopala Kristnama Raju Garu* 271

4. ———*Gift by widow—Religious gifts—Husband's spiritual benefit essential.*

A Hindu widow alienated a small portion of her husband's estate to a Municipality for the purpose of getting a choultry built

Page.

thereon and with a view of getting salvation to my (her) elders as well as myself (herself)."

Held: that the widow had no power to make such alienation and that it was not binding on the reversioners.

The Adoni Municipal Council v. *Kallamma* 15

5. ———*Gift by widow, validity of.*

A gift by a Hindu widow of a portion of her qualified estate, suited to the position of the family and other circumstances of the case, to her son-in-law on the occasion of her daughter's marriage is valid.

Ramasami Aiyar v. *Vengadusami Aiyar* 170

6. ———*Marriage—Sudras—Right or obligation to give in marriage—Suit for expenses.*

Where a Sudra father had failed to give his daughter in marriage until after puberty and the mother gave her away and incurred expenses for the marriage which were found to be reasonable.

Held: that a suit by the mother against the father for the recovery of such expenses would not lie;

Held: also, that there was no legal obligation, but only a right and a religious duty to give in marriage.

Seshammal v. *Munisami Mudaliar* 165

7. ———*Mortgage-Decree against the father—Son's liablity—Son's right to impeach the decree—Transfer of Property Act, S. 85.*

A mortgage decree-holder purchased in execution of his decree against a Hindu father. The sons deny that any debt was due and contend that they are not bound by a decree to which they were not parties.

1. *Held, by Shephard, J.*, that the sons' shares would be bound even though they were not made parties to the suit (1). *Bhawani Prasad* v. *Kallu*, I. L. R., 17 A., 537, *commented on.*

2. As mortgagee had no notice of the son's existence, the sale bound the son's interest as well.

3. *Held*, also, that as it was open to the sons to *have tried* the fact of immorality of a debt, so it was likewise open to them to *try* the existence of the debt itself.

Ramasami Ayyan v. *Virasami Ayyar* 126

8. ———*Son's liability to pay father's debts—Cause of action against son to pay father's debt—Liability arises during father's lifetime—Res judicata.*

(*By the Full Bench.*)

The cause of action for the creditor of a Hindu father to enforce the payment of his debt against his debtor's sons arises during their father's lifetime. A creditor suing a Hindu father for his personal debt is entitled to make his sons also parties to the suit so as to have their liability determined.

R. sued T., a Hindu father, for the payment of a debt due to him and joined his sons also as parties on the ground that the debt was contracted for their family benefit. The suit was decreed against T., and was dismissed as regards the sons. Subsequently, T. died and R. instituted a fresh suit to make the sons pay their deceased father's debt.

Held (by the Division Bench) that the cause of action sought to be enforced in the second suit was identical with that in the first suit, and that the second suit was consequently barred.

Ramasami Nadan v. *Arnachella Gounden* 312

Page.

9 ———— *Son's liability to pay father's debt—Liability arises on death of father—Limitation Act XV of 1877, Sch. ii, Art. 132—Attachment creates a charge in favour of the attaching creditor.*

A money decree was obtained against a Hindu in the year 1882 for the payment of a debt due by him and which was neither immoral nor illegal. During his life-time, all his family property, including the shares of his sons, was attached. He died in 1884, and in 1891 one of his sons put in a claim to the court executing the decree and got his share of the family property excluded from attachment. In a suit brought by the attaching creditor in 1882 to realise the decree-debt from the son:

Held: that the attachment of the son's share during the father's life-time created a charge on such share in favor of the attaching creditor;
that the right to enforce such a charge arises on the date of the father's death within 12 years, from which date the charge could be enforced under Art. 132, Sch. ii of the Limitation Act; and
that, consequently, the plaintiff's suit was not barred by limitation.

Lakshmana Aiyar v. *Srinivasa Aiyar* 64

10. ———— *Stridhanam, definition of, in Mitakshara—Wife's acquisitions from strangers, nature of—Devolution of stridhanam—Enfranchisement in the name of a married woman.*

Under the Hindu law, as administered in this part of India, the word *stridhanam* must be taken to have the wide significance attached to it in pl. 1., S. 2, ch. II, of the Mitakshara, *i.e.*, to denote whatever is lawfully acquired in any manner by a woman married or not, and to follow the special lines of devolution as the case may be as prescribed by the Mitakshara, except in cases where either a consensus of opinion among the later commentaries prevalent have, or a course of judicial decisions might have, established a different rule.

The holder of the office of maniem in a Government village was dismissed for embezzlement. He was one of two brothers who together constituted a joint Hindu family. Sometime after his dismissal, the Government enfranchised the inam attached to the office in the name of his wife. In a suit by his daughter, after his wife's death, instituted against him and his brother, for the recovery of the property so enfranchised.

Held: that the inam after the enfranchisement became the wife's *stridhanam* in which the husband had no such joint-right as would make him take it as survivor after her death, that after her death the proper heir to the inam was her daughter and the plaintiff, and not her husband.

Salemma v. *E. Latchman Reddi* 11

11. ———— *Stridhanam—Mitakshara—Paramount authority.*

Where authority of the Mitakshara is paramount over the authority of the other commentaries obtaining in this presidency,

The word *stridhanam* is not technical and is to be understood to have the wider significance given to it in the Mitakshara (ch. II., Sec. 11, pl. 1) and except in the case of '*sulka*' (ch. II. Sec. 11, pl. 14) follows the general rule of devolution expounded therein (ch. II, Sec. 11.)

A Hindu father gave some property to his daughter S. after her marriage. She died leaving a son and a daughter surviving. In a suit by the daughter of S. for the recovery of the inheritance from the son:

Page.

Held: that the gift of the property to S. by her father made it her *stridhanam*; that after the death of S. the inheritance devolved on her daughter in preference to her son.

The distinction recognized in the Smriti Chandrika between different kinds of *stridhanam, e.g., Yautaka, Anvadheya*, &c., as regards devolution not followed.

Muthappudayan v. *Ammani Ammal*, ... 9

12. ——————*Stridhanam—Husband's brother's daughter preferential heir to maternal uncle's son.*

In the absence of nearer heirs, the stridhanam of a Hindu woman married in one of the approved forms of marriage devolves on her death on her husband's brother's daughter in preference to her maternal uncle's son.
Per curiam:

The brother's daughter of a Hindu is his bandu,

Subramanyam Chetty v. *Thayaramma* 130

13. —————— *Widow's estate, alienation of—Consent by nearest reversioner at the time of sale not binding on reversioner at the time of death.*

A Hindu widow transferred part of the property which she had inherited from her husband to a stranger with the consent of the then nearest reversioner to her estate. Subsequently the reversioner died and after him the widow. In a suit by persons who were the nearest reversioners at the time of the widow's death to recover the property alienated by her:

Held: that the alienation was not under the circumstances stated binding on them and that they were entitled to recover the same.

Obiter:—Under the Hindu law a female holding a qualified heritage can validly surrender her estate to the then immediate reversioner so as to enable him to take and hold the estate absolutely as if the succession had opened to him by the natural or civil death of the qualified owner. But to effect this it is necessary that he should absolutely and unconditionally surrender the entire inheritance. *Behari Lal* v. *Madho Lal*, I. L. R., 19 C., 241 followed.

Marudamuthu Nadan v. *Srinivasa Pillay* 69

Hypothecation of ship:—*See* Bottomry bond.

Improvements:—*See* Mortgagor and Mortgagee (4).

Injunction where sole possession available:—*See* Specific Relief Act (2).

Irregularities in execution:—*See* Civil Procedure Code (18).

Joint decree-holders:—*See* Civil Procedure Code (21).

Judgment contents of:—*See* Civil Procedure Code (39).

1. **Jurisdiction**:—*See* Provincial Small Cause Courts Act (4).

2. —————— **acquiescence to by non-resident defendant**:—*See* Civil Procedure Code (9).

Karnavan, duties of:—*See* Malabar Law.

Kasavargam tenant:—*Right to dwelling house of Kasavargum.*

Page.

A Kasavargam tenant has a proprietory right to his house, and when ejected is entitled to compensation for his buildings.

Blake v. *Savundarathammal* 163

1. Landlord and tenant :—*See* LIMITATION ACT (3).

2.——————— *See* RENT RECOVERY ACT (1.)

3.———————*Puttah fixing rent "saswathamái" perpetually —Construction of Statute—Retrospective effect, when to be given to statute.*

A mittadar gave a puttah to his tenant having a heritable interest in his holding in the year 1841. The puttah fixed the cowle at Rs. 40 a year and provided that "this sum of Rs. 40 you shall pay prepetually (*saswathamái*) every year as per kist in the mittah cutcherry and obtain receipt."

Held: that the word "*Sáswathamái*" meant perpetually and that the puttah fixed the assessment permanently and for ever.

Held, further, that S. 11 of the Rent Recovery Act had no application to it as the Act itself was passed long after the puttah came into existence and cannot be held to have any retrospective operation in the absence of an express provision in it to that effect.

Rajaram v. *Narasinga* I. L. R., 15 M., 199, *Tulshi Pershad Singh* v. *Ram Narain Singh*, 12 C., 117, } distinguished.

Young v. *Adams* (1898 App. Case, 476) referred to.

Mr. Foulkes v. *Muthusami Goundan* 207

4. Landlord and tenant.—*Exchange of puttah and muchilika, not necessarily the cause of action—Limitation—Onus of proof on plaintiff to show that the plaint is within time—Practice—Second appeal, evidence not allowed.*

The exchange of puttah and muchilika between a landlord and his tenant is not the origin of the right of the landlord to demand his rent. It is a condition imposed by law as a necessary preliminary before the filing of a suit for rent. The cause of action for rent accrues to the landlord when the rent becomes payable according to contract or usage.

Where a landlord sues for rent and the defendants plead limitation, the landlord must prove that the suit was brought within the time allowed by law; and if the landlord fails to adduce such proof in the first court, he ought not to be allowed to remedy the defect in second appeal.

Paramasiva Goundan v. *Kandappa Goundan* 201

5. Landlord and tenant.—*Waste—Converting character of holding—Nanja (irrigable) lands converted into cocoanut tope—Occupancy—Tenant's right to cultivate, unhusband-like.*

The plaintiff was the inamdar of certain nanja (irrigable) lands in North Arcot and the defendant was his tenant having a permanent right of occupancy in the land in his possession. The defendant planted cocoanut trees in a portion of the *nanja* without the plaintiff's consent and converted it into a cocoanut tope. The plaintiff then sued to direct the defendant to remove the cocoanut trees and restore the land to its ordinary state of *nanja*.

Held: that the defendant by planting the cocoanut tope did not convert the character of the holding, nor did he by such act put the land to an unhusband-like use.

Page.

Held, further that the defendant's act did not amount to waste and that the plaintiff was therefore not entitled to a decree.

Ramanadhan v. *Zemindar of Ramnad,* I. L. R., 16 M. 407, }
Lakshmana v. *Ramachandra, Ib.* 10 M. 351, } distinguished.
Kunhammed Narayanan Mussad, Ib. 12 M. 320, }

Venkaiya v. *Ramaswamy* 278

Letters Patent, cl. 15 and 36 :—*See* CIVIL PROCEDURE CODE (4).

1. **Limitation** :—*See* RENT RECOVERY ACT (4) (5).

2.——————*See* SPECIFIC RELIEF ACT (6).

3.—————— *See* LANDLORD AND TENANT (4).

1.—————— **Act** :—*See* HINDU LAW (9).

2.—————— **XV of 1877, S. 12**—*Time taken to obtain copies of judgment and decree included.*

Under S. 12 of the Limitation Act, in computing the period of limitation prescribed for an appeal, the time taken to obtain a copy of the decree and the time taken to obtain a copy of the judgment must both be excluded except where these two periods overlap each other; and where they do overlap, the time overlapped shall be excluded only once.

Raman Chetti v. *Kadiravalu* 148

3.—————— **S. 19**—*Landlord and Tenant—Promise to pay in muchilika amounts to acknowledgment.*

A ryot in a zemindari bound under the Rent Recovery Act to exchange puttah and muchilika executed a muchilika to his landlord on the 25th June 1895 for the Fasli ending with the 30th June 1895. The muchilika contained a promise by the ryot to pay the rent due for the fasli in instalments on certain specified dates *viz.,* 15th August 1894, 30th October 1894, and 30th January 1895) which had already expired at the time of its execution. The rent was not paid and the landlord then filed a suit against the ryot on the 21st February 1898 for its recovery.

Held : that having regard to the fact that, except in very rare instances, these muchilikas are not the source of the obligation to pay rent but only records of the terms and conditions of liablity established by antecedent contracts or by long prevalent usage—the muchilka in question is to be construed as an admission that the instalments fell due on the dates mentioned therein and as an acknowledgment of liability to pay such part of them as had not already been paid and that the suit was therefore not barred by limitation.

Per *Subrahmania Aiyar,* J.:—The promise in the muchilika may be treated as a promise to pay within a reasonable time from the date of the muchilika.

Doe-Darlington v. *Ulph* (132. B. 204), *Hall* v. *Cazenove* (4 East 477) referred to.

Per *Benson,* J.:— In regard to, instalments not due prior to the exchange of puttah and muchilika the promise must be regarded as an acknowledgment that the instalments will become payable on their due dates and as a promise to pay the same on such dutes.

Raja of Venkatagiri v. *Sheik Bade Saheb* 219

4.—————— **S. 21.**—*Dissolved partnership—Power of partners to bind each other—Power of surviving partners to bind representatives of deceased partner by acknowledgment of partnership debts.*

Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorized to do so.

Rajagopala Pillai v. *Krishnasami Chetti* 261

4. A.———— 61 :—*See* HINDU LAW (3).

5.———— **XV of 1897, Art. 97, 116 120.**—*Failure of mortgagor to secure possession—Suit by usufructuary mortgagee for money.*

Where a usufructuary mortgagee sues for the money, the mortgagor having failed to secure him in possession, the period of limitation is six years whether Art. 120 or 116 be applicable.

Kandi Unichaman v. *Ahmed Kuti Kayi* 81

6.———— **XV of 1877, Sch. ii, Art. 106 and 116.**—*Suit for account of dissolved partnership.*

The plaintiff sued for an account and share of profits of a partnership, of which he and the defendants and M. were members. The partnership was entered into under a registered agreement executed in 1890, and was not for any fixed term, M. died on 15th June 1891; the partnership business was completed on the 30th August 1891, and the suit was brought on the 3rd September, 1894.

Held: that Art. 116, Sch. ii of the Limitation Act had no application and that the suit was barred under Art. 106 of Sch. ii.

Ranga Reddi v. *Chinna Reddi*, I. L. R. 14 M., 465, referred to.

Per Curiam:—We are not prepared to say that the Art. (116) can be stretched to cover every case in which the plaintiff's claim may, in its origin, be referred to a contractual relation which is expressed in a registered agreement.

Vayiravan Asary v. *Panniah* 15

7.———— **Sch ii, Art. 120 and 132** —*See* TRANSFER OF PROPERTY ACT (5).

8.———— **II., Art. 132.**—*Bond payable "on demand or when you require" after a contingency—"On demand or when you require," meaning of.*

A hypothecation bond after fixing a term of 3 years for the repayment of the principal and interest due under it, stipulated that the interest under the bond shall be paid each year and proceeded as follows: "In default of paying on the above dates I shall pay the said sum with interest at Rs. 15 per cent. per annum, from the date of the bond, irrespective of the above due date, whether you make the demand."

Held: that the cause of action to sue for the money due under the bond does not arise immediately on failure to pay the interest of any one year, but only arises on actual demand made after such failure.

Perumal Ayyan v. *Alagirisami Bhagavathar*, 20 M., 245, referred to S. A. 100 of 1897 followed.

Mutukaruppa Goundan v. *Kumarasami Goundan* 167

9.———— **XV of 1877, Sch. ii, Art. 132** :—*See* HINDU LAW (9).

10.———— **XV of 1877, Sch. ii, Arts. 142 & 144** :—*See* CIVIL PROCEDURE CODE (11).

Page.

11.———— **Sch. ii, Art. 147.**—*Simple mortgage*—

A suit by the mortgagee upon a simple mortgage bond executed in the year 1873 for recovery of mortgage-money by sale of the mortgaged property is governed by Art. 132 and not by Art. 147 of Sch. ii of the Limitation Act, because in such a suit no prayer for foreclosure or sale in the alternative can possibly be claimed.

Ramachandra Rayaguru v. *Modhu Padhi*, I. L. R., 21 M., 326, F. B., followed.

Nilakanta Rotho v. *Gongapani Panda* 217

12. ———————— **S. 7, Sch. ii, Art. 165.**—*Application by minor through next friend.*

Art. 165, Sch. ii, Limitation Act, is applicable not only to strangers but also to persons who are parties to, and bound by, the decree in execution of which the application is put in.

The word "application" in S. 7 of the Limitation Act includes an application to execute a decree, as well as an application relating to a matter arising in execution of a decree.

A decree was obtained against a minor defendant, and in execution thereof the minor was dispossessed of some property. More than thirty days from the date of the dispossession, the minor applied through a next friend under S. 244, C. P. C., to set aside the sale.

Held: that the application was governed by Art. 165, Sch. ii. of the Limitation Act;

and that by reason of the provisions of S. 7 of the Limitation Act, the application was not barred.

Rama Row v. *Venkatesh Bhandari*, I. L. R., 5 M., 171, } referred to.
Anantharamayyan v. *Karuppana Kalingarayan* ... ... I. L. R., 4 M., 119, }

Rathnamaiyar v. *Kristna Dos Vital Dos* 75

13. ———— **Sch. iii, Art. 173-A.**:—*See* CIVIL PROCEDURE CODE (20).

14. ———— **XV of 1877, Sch. II, Art, 178.**—*Application for renewal or revival of previous execution application.*

When once an application for execution of a decree has been finally and properly dismissed it cannot afterwards be renewed or revived by any fresh application put in for the purpose.

In 1880, S. obtained a decree against a Hindu who had been transported for life in 1879, and whose property had been confiscated by Government. In 1881, the Government released its lien on the property in favour of the convict's minor son; the estate being placed under the control of the Court of Wards. On the 19th September 1892, G., the assignee of the decree, applied for its execution against the property in the hands of the minor son. The petition was dismissed, the decree-holder being referred to a regular suit. G. then filed a suit and got a declaration that he can execute the decree against the property in the son's hands; and on the 3rd October 1895 applied for a restoration of the petition of 19th September 1892, and for the sale of the property.

Held: that the application of the 3rd October 1895, was barred as it had been made more than three years from the previous application of 19th September 1892.

Sooryanarayana Pandarathar v. *Gurunatha Pillai* 25

15. ———— **Sch. ii, Art. 178.**—*Continuance or revival of applications—Practice of 'striking off' execution applications illegal.*

The practice of 'striking off' applications for the purpose of statistical returns is without warrant and is illegal. If a court so 'strikes off' an application without legally disposing of it, the rights of the parties to it are not affected thereby; the application must be regarded as pending notwithstanding its removal from the file.

An application for execution of a decree was made to a court on the 14th April 1893. Immediately after, an injunction was issued by another tribunal staying execution of the decree. Thereupon the former court ordered that the application be struck off the file on the 20th July 1893. The injunction was afterwards removed in 1896, and on the 6th July of that year the decree-holder applied again for execution. The new application did not in terms ask for a revival or continuation of the former application.

Held: that the application of the 6th July 1896 was not barred by limitation; that the application of the 14th April 1893 must be regarded as pending, notwithstanding its being struck off the file; and

that the new application must be taken as one to revive or continue the former although it contained no words to that effect.

Biswa Sonan v. *Binanda Chunder*, I. L. R., 10 C. 417; *Chintaman* v. *Balshastri*, I. L. R., 16 B., *Ib.* 1. A. 394 followed. *Narayana Numbi* v. *Puppi Brahmani*, *Ib.* 10 M., 23, distinguished.

Sivarama Tevar v. *Kosil Arulanantham Pillai* 18

16. ———— **Sch. ii, Art. 179.**—*See* PROVINCIAL SMALL CAUSE COURTS Act (2).

17. ———— *See* CIVIL PROCEDURE CODE (20.

18. ———— **(Cl.) 4.**—*Application for attachment list—Step in aid of execution.*

An application by a decree-holder for a copy of the list of properties attached in previous execution proceedings is not an application to take a step in aid of execution within the meaning of cl. (4), Art. 179, Sch. ii of the Limitation Act. *Kunhi* v. *Seshagiri*, I. L. R., 5 M., 141, referred to.

Rangachariar v. *Balaramasami Chetti* 53

Malabar land tenure—*Grant of cowle by Government, effect of—Jenmi's right how far affected by grant of cowle.*

The grant of a cowle by Government in jenmi lands is only to insure a favorable assessment of Government dues on cultivation. It does not in any way affect the jenmi's right in the land. But the holder of the cowle must settle his terms with the jenmi at the same time that he receives the cowle from Government. If he fail to do so, he is liable to be evicted by the jenmi. Should, however, he be left in possession for more than twelve years without any recognition of the jenmis right, he would like any other trespasser acquire a valid title by prescription against the jenmi.

Secretary of State v. *Astamurti*, I. L. R., 13 M., 118, referred to.

Muniappan Chetti v. *Mannarkal Muppil Nair* 117

Malabar Law—*Karnavan, duties of.—Education—Maintenance.*

It is not incumbent on the karnavan of a Malabar tarwad as part of his duties with reference to his members to give them education through the medium of the English language and on Western lines.

Page.

The plaintiff, a junior member of a Malabar tarwad, went out of the tarwad house to get himself educated in an English school in a different place. The defendant, karnavan of the tarwad, did not supply him with money for the necessary expenses during his stay in that school. The plaintiff now sued for the expenses incurred by him for maintenance and school fees while at the latter place.

Held: that the plaintiff was not entitled to recover.

Krishnan v. *Govinda Menon* 29

Master's Liability:—*See* TORTS.

Mesne Profits:—

A trespass on a piece of land is by itself no proof of any trespass to or conversion of any moveables to be found on the land at the time the alleged trespas took place.

See also CIVIL PROCEDURE CODE (12).

Thottathil Ahmmad v. *Muthedath Arutharaman* 273

Mortage—*Decree for sale—Interest acquired by execution—purchaser—Right of previous purchaser to redeem—Condition for so redeeming—Contribution.*

N. mortgaged some properties to C. and afterwards sold part of the properties mortgaged to A. who in turn sold the part to S. Subsequent to the sale to S., C. sued on his mortgage, and to this suit S. was not made a party. The suit was razied in respect of a part of the mortgage sum proportionate to the value of the property retained by N. and for the rest a decree was passed against N. personally and against that part of the mortgaged property sold to S. In execution of this decree, R. became the purchaser for a sum much smaller than the decree-amount. In a suit by R. against S. to recover possession of the property:

Held: that S. not having been made a party to the suit by C. against N., ought now to be allowed the same rights that he would have had if he had been joined in the prior suit and ought, therefore, to be allowed to redeem R.;
and that such redemption ought to be allowed only no payment by S. of a proportionate part of the mortgage-amount due at the date of the prior decree on the part of the mortgaged property purchased by him; and not of the amount paid by R. for his purchase in the execution.

Sivathi Odayan v. *Ramasubbayyar.* 21

1. **Mortgagor and mortgage**:—*See* TRANSFER OF PROPERTY ACT (3).

2. ———————*See* TRANSFER OF PROPERTY ACT (5).

3. ———————*Equity of redemption of, fetter on, invalidity of—Contract to sell mortgaged property in case of failure to redeem.*

A contract between the mortgagor and mortgagee of immoveable property, entered into at the time of the execution of the mortgage, to the effect that the mortgaged property is to be sold in case of default of payment of the mortgage money at the time fixed for it in the mortgage-deed is invalid and cannot be enforced.

Kanaran v. *Kuttooly.* 62

Mortgagor and mortgagee.—*Subsequent mortgagee, rights of—Party to suit by first mortgagee—Form of decree in subsequent mortgagee's suit—Right of auction—Purchaser—Improvements,*

Page.

In an auction-purchase in execution of a mortgage-decree, the purchaser takes both the interest of the mortgagor and of the mortgagee in whose favour the decree was passed.

Where a suit is brought by the first incumbrancer against his mortgagor and a decree is obtained without the subsequent incumbrancer being made a party to the suit, the latter is not bound by the decree in the suit; and in a suit, by him for his mortgage amount he is entitled to have the same decree he would have had if he had been made a party to the first suit. In such a suit he will be entitled to re-open the account between the mortgagor and the first mortgagee and he will not be concluded as to the value of the property by the original sale.

The plaintiff was a subsequent mortgagee. The defendants were auction-purchasers of the mortgaged properties in execution of a decree obtained by a prior incumbrancer in a suit to which the plaintiff was no party. Since the purchase the defendants had made some improvements in the property which were not such as a mortgagee with possession would have been entitled to charge against the mortgagor. In a suit by the plaintiff for his mortgage-money by sale of the mortgaged property:

Held: that a decree should be passed directing the plaintiff to pay to the defendants the original mortgage amount with interest, and on such payment, the property be sold and the sale-proceeds applied first in satisfaction of the plaintiff's mortgage-debt and the surplus, if any, be handed over to the defendant as presenting the mortgagor's interest; and that in default of such payment by the plaintiff, the suit stand dismissed.

Held, further, that the defendants were not entitled to credit for money spent by them for the improvements.

Nagammal v. *Venkatagiri Aiyar* 298

Mortgage, simple :— *See* LIMITATION ACT (11).

Negotiation—*Promissory note—Transfer of pro-note without endorsement.*

A promissory note may be transferred by the holder just like any other chose in action without endorsement. There is nothing in the Negotiable Instruments Act which prescribes endorsement as the only mode of transfer so as to render transfer made by any other mode invalid.

Pattat Ambadi Marar Krishnan, I. L. R., 11 M., distinguished.

A transfer of a pro-note without endorsement does not give the transferee the rights which, according to Law Merchant (The Negotiable Instruments Act) an endorsement would give him.

Ramachandra Rao v. *Kuppusami Aiyar* 263

Non-joinder, effect of :—*See* CIVIL PROCEDURE CODE (10).

———— **of parties**.—*Joint decree-holders—Purchase by decree-holder in execution with permission of Court—Suit by decree-holder and certified purchaser—Other decree-holders not necessary parties.*

A. and two others got a decree for money against certain persons, and in execution, the properties of those persons were sold and purchased, with the permission of the Court, by A., in whose name alone the sale certificate was issued. The two others were not concerned in these proceedings, and had no interest in the sale except that they were also entitled to the decree amount. A. was put in possession and was afterwards dispossessed by the judgment-debtors. In a suit by A. for the recovery of possession of these properties.

Page.

Held: that the other two persons were not necessary parties and that the suit was maintainable at the instance of A. alone.

Arumugam Chetty v. *Sundararaja Aiyangar* 3

———— **of representative** :—*See* CIVIL PROCEDURE CODE (24).

Novation—*Trustee's obligation, extinguishment of—Presumptions.*

The defendant's sister gave him some lands burdened with a trust for the payment of a sum of Rs. 100 to a certain temple. Subsequently, the defendant hypothecated the same lands to the trustees of the temple and agreed to pay the sum within a certain time with interest at 3 per cent. per annum, and, in default of payment, with interest at 24 per cent. per annum. The hypothecation-deed was not registered. In a suit by the trustees for the recovery of the amount more than six years from the date of the hypothecation-bond.

Held:—that the execution of the hypothecation-bond by the defendant did not in any way alter the trust obligation which he was bound to perform and that the plaintiff was entitled to recovery as under the trust.

Mayandi Chetty v. Samiu Pillai 296

Occupancy.—*See* LANDLORD AND TENANT (5).

"Oral agreement," meaning of:—*See* INDIAN EVIDENCE ACT (2).

"On demand or when you require" meaning of:—*See* LIMITATION ACT (8).

Partial redemption :—*See* TRANSFER OF PROPERTY ACT (3).

Partial review, effect of:—*See* CIVIL PROCEDURE CODE (27).

Partition decree, effect of, on Survivorship :—

When a decree is passed in a partition suit, the plaintiff is from that date in point of law divided from the other coparceners.

See also CIVIL PROCEDURE CODE (23).

Chinnathal v. *Viruthacha Pillai* 37

Partnership dissolved:—*See* LIMITATION ACT (4).

Penal Code, Ss. 188 and 447:—*See* CRIMINAL PROCEDURE CODE

———— **Ss. 206, 378, 403, 424** :—*'Standing crops' attachment by a Civil Court on—Removal of standing crops not amounting to theft.*

Standing crops in the possession of the accused had been attached by a Civil Court in a suit in which they were, defendants. The accused notwithstanding the attachment, cut and carried away the crops.

Held: that the act of the accused amounted to an offence under S. 424, Indian Penal Code.

Per *Benson, J.*:—The act of the accused amounts also to the offence of criminal misappropriation under S. 403, Indian Penal Code.

Queen-Empress v. *Makam Abayya* 259

Possession during lease :—*See* EJECTMENT SUIT

Procedure :—*See* COMPROMISE OF SUIT

Profession, exercise of :—*See* THE MADRAS MUNICIPALITY ACT

———— **meaning of** :—*See* DISTRICT MUNICIPALITIES ACT.

Page.

Profession Tax; *See* THE MADRAS MUNICIPALITY ACT.

1. Provincial Small Cause Courts Act, Art. 11 and 13—*Jodi—Small Cause Nature.*

A suit for jodi is cognizable by a Small Cause Court.

Raja Velugoti v. Venkata Rao 83

2. ———— Sch. II, Art. 13—*Suit for emoluments of office—Suit of a Small Cause nature—Joint decree, execution of—"Final decree," meaning of—Limitation Act, Sch. ii, Art. 179,—Application for execution after decree of appellate Court—Appeal imperilling decree.*

The plaintiff held the office of *stanacharya* in a certain temple under a contract by which the defendant dharmakarta had agreed that the plaintiff should hold the office and receive the mamool payments.

Held: that a suit by the plaintiff for the recovery of fees due for the office for a certain period as under this agreement is not a suit of a Small Cause nature but fell within Art. 13, Sch. II. Provincial Small Cause Courts' Act.

A sued two defendants a mother and her daughter for money due by virtue of an agreement executed by the mother alone and obtained a decree against both on the 6th May, 1893. The mother died before an appeal was preferred. The daughter alone appealed, and in second appeal the High Court reversed the decree in her favour on the 28th August, 1895, on the ground that she was not party to the agreement. On the 31st July 1897, A put in an application to execute the decree against the daughter as the representative of the mother.

Held: that the application was not barred by limitation; and that time should be reckoned from the date of the decree of the High Court, which was "the final decree of the appellate court" within the meaning of Art. 179.

Venkata Chinnaya Rao v. Krishna Charyalu 228

3. ———— Sch. ii., Cl. 19:—

It applies only to suits for a declaratory decree properly so called, and not to suits in which the declaration is merely introductory to other relief claimed. *See* also CIVIL PROCEDURE CODE (40).

Revur Subba Row v. Papi Reddy 149

4. ———— Sch. II, Art. 35, Cl. *J—Suit for money paid in excess under pressure—Jurisdiction.*

Art. 35, Cl. J., Sch. II of Act IX of 1887, applies only to suits for the recovery of compensation for damage caused to the aggrieved party by an illegal, improper or excessive distress. It has no application to suits to recover money levied in excess under the illegal distress. *Dewany Roy* v. *Sundar Tewary*, I. L. R., 24 C., 165, followed.

Karuppanan Ambalam v. Ramasami Chetti 165

Puttah and Muchilika, exchange of:—*See* LANDLORD AND TENANT (4).

Railways Act IX of 1890, S. 72:—*See* CONTRACT ACT.

Refund:—*See* CIVIL PROCEDURE CODE (34).

Registration Act, S. 17, cl. n:—*See* STAMP ACT (3).

Rent Recovery Act (Madras Act VIII of 1865), Ss. 3, 8, 9, 11.—*Mokhassadars not tenants—Mokhassadars not bound to accept pattah.*

Page.

S. 3 of the Rent Recovery Act and other sections therein which specially refer to it are intended to regulate the relation existing between tenants who are actual cultivators of the soil and their immediate landlords alone. Intermediate landlords, such as inamdars, mokhassadars, &c., who pay a permanently fixed quit-rent (*kattubadi, poruppu, jodi or* by whatever other name it might be known) and who are not actual cultivators of the soil, are not bound to accept pattahs from and exchange muchilikas with the zemindars, their superior landlords.

Lakshminarayana Pantulu v. *Venkatrayanam* 43

2. ———————— **Ss. 10, 12, 33, 41, 44, 69, 76,** *Ejectment order by Collector—Appeal—Suit to set aside order of ejectment non-sustainability of.*

By the Full Bench; Mr. *Davies*, J., dissenting :—Where a Collector passes a judgment against a tenant under S. 10 of the Rent Recovery Act and, subsequently, under the latter part of the same section passes an order of ejectment on proof of the tenant's failure to obey the judgment, the tenant cannot question the validity of that order in a separate suit in a Civil Court.

Per *Officiating Chief Justice* and *Moore*, J., *Obiter* :—An order of ejectment passed by a Collector under the latter part of S. 10 is appealable to the District Judge.

Per *Davies*, J :—An order of ejectment passed by a Collector under the later part of S. 10 is not a judgment and not appealable. A separate suit to set aside such an order does lie in a Civil Court.

Manicka Gramany v. *Ramachandra Aiyar* 210

3. ———————— **S. 11.**—*Registration Act, S. 17.*

A document which only evidences an agreement to vary the terms of a tenancy with reference to the amount of rent to be paid does not require registration.

In a suit by a landlord against his tenant for acceptance of patta, the tenant claimed a permanent remission of rent under a *takid* issued by the predecessor in title of the plaintiff, the alleged ground for the remission being that the waste lands in the defendant's patta contained inferior soil and were partly within the water-spread of a tank and that the defendant used to get occasional remissions whenever any lands were left uncultivated :

Held: that the *takid* did not require registration and was admissible in evidence to prove the reduction in the amount of rent to be paid; but that the stipulation for the remission of rent to be paid was not binding on the plaintiff as it had not been granted for any of the purposes mentioned in the last para. of S. 11, Rent Recovery Act.

Obai Goundan v. *Ramalinga Aiyar* 256

4. ———————— **Ss. 18 and 51.**—*The General Clauses Act, S. 10—Madras General Clauses Act, S. 11—Limitation—Summary suit to set aside distraint, time for.*

Summary suits under Ss. 18 and 51 of the Rent Recovery Act must be brought within the 30 days provided therein. Neither the General Limitation Act nor S. 10 of the General Clauses Act or S. 11 of the Madras General Clauses Act applies to such suits so as to extend the time in any manner whatsoever.

A summary suit under S. 18 of the Rent Recovery Act to set aside a distraint was brought on the 31st day after the distraint, the 30th day being a Sunday.

Page.

Held: that the suit was not barred by limitation on the general principle that where parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by act of the Court itself, they are entitled to do it at the first subsequent opportunity. *Shooshee Bhusan* v. *Gobind Chunder*, I. L. R., 18 C., 231, and *Peary Mohun Aich* v. *Anunda Charan Biswas* 631, followed.

Sambasiva Chari v. *Ramaswami Reddi* 265

5. ———— **S. 78**:—*Limitation—Cause of action.*

A distraint by a landlord was set aside by the Collector as illegal and the grain attached was ordered to be delivered back to the tenant. The tenant sued the landlord for damages for short delivery, alleging that the short fall had arisen owing to the negligence of the landlord in keeping the grain while under attachment, and for expenses incurred by him in getting the attachment removed. The suit was instituted more than six months from the date of the attachment but within six months from the date of the Collector's order.

Held: that the cause of action for the suit arose at the date of the attachment; and

that it was barred by limitation under S. 78 of the Rent Recovery Act.

———— **S. 37**.—*Sale for arrears of revenue.*

The words "full amount of arrears" in S. 37 of the Revenue Recovery Act mean only the arrears of revenue on account of which the land was attached and the notice of sale issued, and do not include arrears which might accrue after the attachment and sale notice but before the sale.

The revenue due on the plaintiff's mitta for fasli 1302 fell in arrears and a portion of the mitta was attached and advertised for sale. Some days before the date fixed for the sale, the plaintiff tendered the amount of arrears for which the land had been attached. But at the time of the tender the rent for fasli 1303 had become due and had not been paid. The Collector, therefore, refused to stay the sale and sold the attached property for the arrears of fasli 1303.

Held:—That the sale was invalid and should be set aside.

The Secretary of State for India v. *Rajah Goundar* 24

Subrahmania Aiyar v. *Panchanada Aiyar* 10

Redemption, partial:—*See* Transfer of Property Act (3).

Registration Act, S. 17;—*See* Rent Recovery Act (3).

1. **Res judicata**;—*See* Civil Procedure Code (8).

2. ———— *See* Hindu Law (8).

Restitution under decree;—*See* Civil Procedure Code (3).

Revisional jurisdiction;—*See* Civil Procedure Code (41).

Rule of Practice, Original Side, High Court:—*Commissioner's certificate of account—Powers of Appellate Court to interfere with the Commissioner's certificate.*

Where a commissioner is appointed in a suit to look into and settle the accounts of the parties and he issues a certificate and the presiding Judge agrees with it, it is unreasonable that an Appellate Court should go into particulars in the accounts in regard to which both the Judge and the commissioner had

Page.

come to the same conclusion. The Rule of Practice No. 292 on the original side that "a certificate or report of an officer of the court or commissioner, unless discharged or varied, will be taken as conclusive evidence of the facts found therein" is sound and reasonable.

Thiruvengadasami Mudaliar v. *Raghavacharry* 133

Sale :—*See* Civil Procedure Code (24).

Scandalous matter :—*See* Civil Procedure Code (4).

Son's liability to mortgage decree against the father :—*See* Hindu Law (8) (9).

Specific Relief Act, Ss. 19 and 27.—*Specific performances and damages, no separate suits for—Deposit, return of—Civil Procedure Code, Ss. 13, 43—Limitation.*

The plaintiff entered into a contract for the purchase of lands from the defendants and made a deposit of Rs. 165, with them as part of the price consideration for the sale. Subsequently, the defendants refused to perform the contract; and the plaintiff brought a suit for specific performance in which, however, he failed. He now sued more than three years from the date of the former suit for the return of the deposit.

Held: that the plaintiff ought to have sought for this relief in the previous suit for specific performance and that the present suit was barred (by S. 43, Civil Procedure Code); and

that time began to run against the plaintiff for the recovery of the deposit from the time when he first sought to enforce his right by bringing his action for specific performance and that the present suit was barred by limitation.

Chidambara Nadar v. *Srinivasa Aiyangar* 61

2. ———————— **S. 42.**—*Further relief—Injunction where sole possession available—Person in joint possession—Suit for sole possession or for mere declaration.*

A person who is in joint possession of a temple and its properties with others who claim to be joint trustees with him must, in order to exclude them from the management, sue for sole possession and not for a mere declaration that he is the proper trustee and the others not. The addition in the plaint of a further prayer for an injunction against the others is not either an appropriate or a sufficient further relief so as to save his suit from the bar created by S. 42 of the Specific Relief Act.

Ramaswami Aiyar v. *Annasami Aiyar* 121

Stamp :—*See* Civil Procedure Code (13).

1. **Stamp Act, I of 1879, S. 34, Sch. I, Art. I, cl. 5 (c).**—*Letter containing statement of agreement not acknowledgment—Admission of documents, once made, final.*

A partnership was formed on the 8th October 1885 for a term of three years for the purpose of carrying on trade in salt. K. L., one of the partners, sued the other partners for his share of the profits on the 23rd, June 1892. After the dissolution of the partnership in 1888, disputes arose between K. L., and the defendants as to the exact share of K. L., in the partnership business, and the matter was decided on a compromise. On the 26th June 1889, the defendants had written a letter to K. L., in which they referred to this compromise and accepted it and then gave him an approximate amount of the profits standing to his credit. K. L. relied on this letter which was unstamped for saving his suit from the bar of limitation. The letter was a admitted in evidence by the first Court without payment of stamp duty or a penalty.

Page.

Held: that the letter did not amount to an acknowledgment of any debt, but amounted to an agreement falling under Art. 5, Clause (c), Sch. I, Stamp Act; and
that, inasmuch as it had been admitted without payment of stamp duty and penalty, it could not afterwards, at any stage in the suit, be rejected as inadmissible in evidence.

Ramasami Chetti v. *Ramasami Chetti* I. L. R., 5 M., 220, followed.
Koob Lall v. *Jungle Singh* ... ... „ 3 C., 787, followed.
Devachand v. *Hirachand Kamaraj* ... „ 13 B., 449, followed.
Shiddappa v. *Irava* ... ... „ 18 B., 737, followed.

Lakshminarayana v. *Ramajogigaru* 66

2. ——— **§ 18.**—*Foreign note—Evidence admissibility on unstamped note.*

A pro-note made out of British India when sued upon by the first holder within British India, does not require to be stamped before it is received in evidence in the suit. It is enough if the proper stamp required by § 18 of the Stamp Act be affixed to it before decree is passed.

Griffin v. *Weatherby*, L. R., 3 Q. B., 753, referred to.

Simulu Ebranim Rowthan v. *Abdul Rahiman Mahomed Vana* ... 182

3. ——— **S. 58**—*Indian Evidence Act, Ss. 91 and 92.—Indian Registration Act, S. 17, Cl. N—Receipt of money—Proof of 'aliundi'—Receipt, registration of.*

S. 58 of the Indian Stamp Act does not prescribe a receipt as the only proof of payment so as to preclude any other evidence of such payment. A person making a payment may demand a receipt, and when the receipt so given is not produced in evidence, evidence *aliundi* is admissible in proof of the payment.

A receipt for payment of money was given by a mortgagor to the mortgagee. After the mortgage-debt was discharged, the mortgagor took back the receipt with an endorsement thereon that the debt was *nil*. In a suit by the mortgagee for his debt against the mortgagor.

Seshayya v. *Subbamma* ... ...

Held: that the endorsement did not require registration, and was, therefore, admissible in evidence and that evidence *aliundi* be given in proof of the payment and discharge.

Stamp duty, payment of:—*See* Civil Procedure Code (37).

Standing crops attached. removal of:—*See* Penal Code.

Siridhanam:*See*—Hindu Law (10) (11).

——— :—*See* Hindu Law (11) (12).

———, **definition of**:—*See* Hindu Law (10).

———, **and devolution of**:—*See* Hindu Law (10).

Summary Suit to set aside distraint:—*See* Rent Recovery Act (4).

Summons, serving of:— *See* Civil Procedure Code (14).

Surety, liability of:—*See* Civil Procedure Code (29).

Theft:—*See* Penal Code.

1. **Torts**:—*See* Civil Procedure Code (10).

Page.

2. ——*Liability og agent or servant torts committed by himself—Liability of master for torts of agent or servant.*

Whoever commits a wrong is liable for it himself, and it is no excuse that he was acting as an agent or servant on behalf of and for the benefit or another. When that other person is also liable the party wronged has his remedy against both or either of them at his choice.

The plaintiff entered into a contract with one M by, which, the latter was allowed to take loose stones lying on the surface of certain hills belonging to the plaintiff. In breach of this contract M employed the defendants, his contractors, to excavate and quarry stones. The plaintiff now sued the defendants for damages sustained by him by this unlawful quarrying.

Held: that the cause of action against the defendants was one in tort and had nothing to do with the contract of the plaintiff with M, and that the plaintiff's suit should be decreed.

Sri Rajah Bounnadevara v. *Putman* 185

Transfer of Property Act, S. 54--*Suit in ejectment not allowed where defendant is in a position to enforce specific performance of agreement to execute kanom—Oral agreement with possession—Kanom, for more than* 100 *rupees.*

The plaintiff sued to eject the defendant, his tenant. The defendant admitted the plaintiff's title, but set up a contract under which the plaintiff had agreed to grant a kanom to the defendant and had taken from him Rs. 405, the kanom amount. The contract had been entered into in 1892 and the suit in ejectment was brought in 1893:

Held: that the defendant's right to enforce specific performance of the contract was alive and not barred by limitation, and that the plaintiff's suit ought to be dismissed as being in fraud of his own agreement.

Dictum in *Pappi Reddi* v. *Narasa Reddi*, I. L. R., 16 M., 464, doubted. *Begam* v. *Muhammad Yakub*, I. L. R., 16 A., 344 and S. A. 730 of 1894 followed.

Ittappan v. *Parangadan Nair* 137

2. ————————**S. 55** :—*See* CIVIL PROCEDURE CODE (6).

3. ————————**S. 60.**—*Mortgagor and mortgagee—Right of person partially interested to redeem the whole—Partial redemption.*

The rule found in S. 60 of the Transfer of Property Act "that a person interested in a share only of the mortgaged property shall not be entitled to redeem his share only on payment of a proportionate part of the debt" creates not merely a liability in the mortgagor for the benefit of the mortgagee, but also a right in the former, to redeem the whole.

A person interested in a share only of the mortgaged property can redeem the whole even against the wish of the mortgagee and cannot be compelled to redeem his share only of the mortgaged property on payment of a proportionate part of the entire mortgage debt.

Jathavedan Namboodri v. *Parameswaran Namboodri* 309

4. ————————**S. 60, cl. (4)**—*Partial redemption.*

Except as provided in cl. 4, S. 60 of the Transfer of Property Act, no person interested in a portion of the mortgaged property is entitled to redeem his share only on payment of a proportionate part of the money remaining due on the mortgage.

Kuppusami Chetty v. *Papathi Ammal* 6

Page.

5. ——————— S. 68, *Mortgagor and mortgagee —Usufructuary mortgagee, possession not given to—Mortgage-money, rights to sue for, by sale of property—Limitation Act, Sch. II, Act* 120 *and* 132.

A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged though empowered under S. 68 to sue for his mortgage-money is not entitled in such suit to claim an order for the sale of such property.

The defendants mortgaged some property to the plaintiffs under usufructuary-mortgage executed in February 1887. The plaintiffs were not given possession of the property and they sued the defendants for the realization of the mortgage amount by sale of mortgaged property in the year 1895.

Held: that the plaintiffs had no right to claim an order for the sale of the omortgaged property and that the suit was barred by limitation.

Arunachellam Chetti v. *Aiyavien* 153

6. ——————— Ss. 68 and 98.—*Mortgagor and mortgagee—Right of mortgagee to sue for mortgage-money—Right of mortgagee to sue for damages.*

A. mortgaged his property to B. by a deed which ran as follows:—"Usufructuarily mortgaging to you the immoveable property . . . . . . The amount borrowed upon it is Rs. 500. . . . You shall for the said amount and for its interest enjoy the said properties for three faslies, *i.e.*, 1294 to 1296. . . . . . We shall thus redeem the land and house without paying to you the said principal, amount or interest and you shall immediately on the expiry of the said term redeliver the said properties to us." Under this deed B. was put in possession of the house alone and not of the land. In a suit against B. for possession of the house after the three years by a purchaser at court auction of the right title and interest of A.

Held: that B. was not entitled to retain the house and that he was bound to give it up after the expiry of the three years; and that the only right of B. was to sue A. for damages for non-delivery of the whole of the mortgaged property.

Per curium:—S. 68 of the Transfer of Property Act only contemplates cases where the mortgagee is under the mortgage entitled to claim re-payment of the mortgage-money before redemption.

Visvalingam Pillai v. *Palaniappa Chetty* 113

7. ——————— Ss. 86, 87.—*Mortgagor and mortgagee—Foreclosure decree—Extension of time for payment after the time mentioned in the decree—Order absolute necessary.*

Where a mortgagee obtains a decree for foreclosure, it is imperative on his part to apply for and obtain a second order or order absolute for foreclosure before he can take possession of the mortgaged property so as to enable the mortgagor to pay the mortgage amount before the property is absolutely foreclosed or obtain an extension of time for such payment on good cause being shown. And where a mortgagee obtains such an order absolute without notice to the mortgagor, the latter may apply to set aside the *ex parte* order and recover possession of the property after paying the decree amount or ask for an extension of time for such payment.

Venkata Narayana Reddi v. *Papayya.* 205

8. ——————— S. 85:—*See* HINDU LAW (7).

Page.

Transferee —decree-holder's right to execute :—*See* CIVIL PROCEDURE CODE (22).

Transfer without endorsement :—*See* NEGOTIATION OF PROMISSORY NOTE.

Trespass upon property under attachment by Magistrate :—*See* CRIMINAL PROCEDURE CODE.

Trustees' obligation :—*See* NOVATION.

Trustee, powers of:—*See* CIVIL PROCEDURE CODE (38).

Trust, religious—*Suit by disciples for appointment—Maintainability of.*

Where in the case of a religious institution plaintiffs alleged that the rule of succession upon the death of the head of the institution without appointment of a successor was for the disciples to meet and elect a duly qualified person to succeed, a suit by some of the disciples having obtained leave under S. 30 but without any allegation as to why no appointment was made by the disciples, for the appointment by the Court of a proper person and for possession being given to such person of the properties of the institution from the defendant, alleged to be a trespasser, is not maintainable.

Sreeman Shadagopa Srinivasaswami v. *Ramanuja Chariar* ... 190

Vakil :—

The abandonment of a point of limitation by his Vakil, on the ground that in the Vakil's opinion the point was not arguable being concluded by authority, does not preclude a party from arguing the point again in appeal.

Nilakanto Rotho v. *Gangapani Panda* 217

Vakils and their powers in the conduct of suits—*Compromise, power to, of vakil—Express authority of client required to compromise.*

A pleader engaged under an ordinary vakalatnama to conduct a suit has, in the absence of an express authority to that effect, no power to compromise the suit on behalf of his client.

Jagapathy Mudaliar v. *Ekambara Mudaliar* 40

Waste :—*See* LANDLORD AND TENANT (5).

Yoggyan Adamanam:—*See* BOTTOMRY BOND.

The Madras Law Journal Reports.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Achamma ... ... Appellant * (*Plaintiff*).

v.

Basappa ... ... Respondent (*Defendant*).

Achamma *v.* Basappa.

Civil Procedure Code, Ss. 223, 268, 269, 274—Transfer of decree for execution to another court—Transfer order obtained by misrepresentation irregular—Irregularity—Attachment of mortgage bond as immovable property merely.

A decree-holder applied to the court which passed the decree to transfer it for execution to another court and in support of the application made a false representation that property of the judgment-debtor was to be found within the jurisdiction of that other court. The court without making any enquiry under S. 223, C. P. C., ordered the transfer. The court to which the decree had thus been transferred executed it and in execution thereof attached and sold a mortgage bond of the judgment-debtor in the custody of a third person, in the manner provided for by the Civil Procedure Code for the sale of movable property. The decree-holder himself purchased the bond and instituted a suit upon the bond. On objection raised by the mortgagor that the transfer of the decree and the sale in execution thereof were illegal and void.

Held: that the fact that the original court was misled into making the order of transfer did not vitiate the validity of the order;

that the omission to attach the mortgage debt as immovable proverty under S. 274 was a mere irregularity;

and that inasmuch as the bond itself had been attached and sold, the sale operated as a valid transfer of the mortgage security to the plaintiff.

Second appeal against the decree of the District Court of Bellary in A. S. No. 224 of 1894, confirming the decree of the Court of the District Munsif of Bellary in A. S. No. 31 of 1893.

This was a suit to recover Rs. 800 due on a registered mortgage bond executed on the 3rd March 1880, by the father of defendant to N. N had transferred the mortgage to one Mallappa and the plaintiff purchased the same in court-auction held on the 15th of August 1892, by the District Munsif's Court of Gooty in execution of the

* S. A. No. 1362 of 1896. 9th September 1897.

Achamma v. Basappa.

plaintiff's decree in O. S. 27 of 1887, on the file of the District Munsif of Bellary against Mallappa and others. The defendant contended that the suit was barred by limitation, that the transfer of the execution of the decree from Bellary to Gooty was illegal as it had been brought about by fraud and that the sale and purchase of the mortgage was void inasmuch as the security was not attached as immovable property under S. 274, C. P. C. The suit was filed in 1893, and the plaintiff relied on a part payment to save the suit from being barred. The Munsif held that the part payment relied on was not-true, that consequently the suit was barred by limitation and that the sale of the mortgage by the District Munsif's Court of Gooty was invalid inasmuch as the property, the subject of the mortgage, was situated in Bellary. On appeal, the District Judge held that the transfer of the decree to the District Munsif's Court at Gooty was brought about by a misrepresentation that some property of the judgment-debtor was within the jurisdiction of that court and that the original court had "made no enquiry and had no real reasons for permitting the transfer, but ordered it to be made in a most careless and off-hand manner, simply because the judgment-debtor did not appear and oppose it." He consequently held that the District Munsif of Gooty had no jurisdiction to sell as there was no valid transfer of the decree to his Court. He further held that inasmuch as the mortgage bond had been attached and sold only as movable property, no attachment had issued under S. 274 and that the sale proceedings were so irregular that the security did not pass under the sale. He accordingly confirmed the decision of the Munsif without going into the question of limitation decided by the Munsif in defendant's favor. The plaintiff then preferred this second appeal to the High Court.

C. R. Tiruvenkatachariar for appellant.

R. Kuppusami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The District Munsif's Court at Bellary which passed the decree ordered the transfer of execution of the decree to the District Munsif's Court at Gooty.

It is contended that in doing so the Bellary Court was misled as to the existence of property in Gooty by the representations then

made on behalf of the judgment-creditor. Assuming that it was so misled, that did not affect the validity of the order. The Court at Gooty in executing that decree was, therefore, acting lawfully and the sale cannot be impeached on the ground that the latter Court had no jurisdiction.

Achamma v. Basappa.

As to the next objection to the sale, we are clearly of opinion that what was attached and sold was the mortgage bond. The omission to attach the immovable property hypothecated by the bond under S. 274, was a mere irregularity which does not affect the sale. The sale was not opposed by the judgment-debtor and became final, *Muniappa Naik* v. *Subramania Ayyan*, I. L. R., 18 M., 437. The mortgagor is not entitled to question the sale on the ground of irregularity.

We must, therefore, set aside the decrees of the lower Courts and remand the suit for disposal.

Costs will abide and follow the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Arumugam Chetty ... ... Appellant * *(Plaintiff)*,

v.

Sundararaja Aiyangar ... Respondent *(2nd Defendant)*.

Arumugam Chetty v. Sundararaja Aiyangar.

Non-joinder of parties—Joint decree-holders—Purchase by decree-holder in execution with permission of court—Suit by decree-holder and certified purchaser—Other decree-holders not necessary parties.

A and two others got a decree for money against certain persons, and in execution, the properties of those persons were sold and purchased, with the permission of the court, by A., in whose name alone the sale certificate was issued. The two others were not concerned in these proceedings, and had no interest in the sale except that they were also entitled to the decree amount. A was put in possession and was afterwards dispossessed by the judgment-debtors. In a suit by A for the recovery of possession of these properties;

Held: that the other two persons were not necessary parties and that the suit was maintainable at the instance of A alone.

Second appeal against the decree of the District Court of Madura in A. S. No. 420, 1896, reversing the decree of the Court of the District Munsif of Shivaganga in O. S. No. 9 of 1896.

* S. A. No. 482 of 1897. 2nd September 1897.

Arumugam Chetty v. Sundararaja Aiyangar.

The facts of the case appear sufficiently from the judgment of the Court.

P. S. Sivaswami Aiyar for appellant.

V. C. Desikachariar for respondent.

The Court delivered the following

JUDGMENT:—The plaintiff and 2 others sued the defendants in a mortgage and obtained a decree and the property was sold.

The plaintiff obtained leave to bid at the sale of the plaint property. He bought it in his own name and for himself alone. He obtained the sale certificate in his own name and he was put into possession of the property by the Court. The fact that two others were interested in the original decree and to that extent interested in the plaintiff's purchase is not sufficient to justify the lower Court in dismissing his action for non-joinder of those who were co-plaintiffs with him in the original suit. This is the interpretation put upon the petitions even by the Munsif, and we think rightly; and the District Judge gives no reason for thinking otherwise.

We must reverse the decree of the District Judge and restore that of the District Munsif. The respondent must pay the appellant's costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Collector of Vizagapatam ... Appellant* (*Defendant*).

v.

Abdul Kharim Sahib ... Respondent (*Plaintiff*).

Collector of Vizagapatam v. Abdul Kharim Sahib.

Civil Procedure Code, Ss. 412, 622—Withdrawal of suit by a pauper—Payment of stamp duty to Government.

The word 'fails' in S. 412, C. P. C., is not restricted to cases of failure after contest but also includes cases where a pauper plaintiff has his suit dismissed after a compromise.

*C. R. P. No. 73 of 1897 6th December 1897.

After the institution of his suit a pauper plaintiff compromised his case with the defendant and requested the court to dismiss the suit; | Collector of Vizagapatam v. Abdul Kharim Sahib.

Held: that the Court in dismissing the suit ought to pass an order for the payment of court fees under S. 412, C. P. C., that an order which does, not provide for such payment is liable to be revised under S. 622, C. P. C.

Appeal against the proceedings of the District Court of Vizagapatam in pauper O. S. No. 5 of 1895.

The plaintiff, a pauper, compromised his suit with the defendants and requested the court to dismiss his suit. A question arose as to the payment of stamp duty of the plaintiff and the District Judge of Vizagapatam then passed the following order:—

"This case appears to be on all fours, except that the suit proceeded as far as the final hearing instead of only as far as the settlement of issues, with the case of *The Collector of Kanara* v. *Krishnappa Hedge*, I. L.R., 15 B., 77, where it was decided that S. 412 of the Civil Procedure Code applied only to cases of adjudicated failure and that as there was no adjudication of the rights of the parties and the plaintiff could not, therefore, have been said to have failed in the suit the case did not fall within the terms of the section at all."

"I have been referred to no decision on the point by the Madras High Court and in the absence of such authority, I feel bound to follow the above ruling. I, therefore, make no order as to the payment of court-fees."

The Collector then preferred this revision petition to the High Court under S. 622.

The Government Pleader (*E. B. Powell*) for appellant.

The respondent was not represented.

The Court made the following

ORDER:—The Bombay case relied on by the District Judge has been dissented from by this Court in referred case, No. 12 of 1893. *Sir T. Muthusami Aiyar* there observed: "The words in the sections are 'succeeds' and 'fails' in the suit and they refer to the ultimate decision or the result of the suit and not to the mode in which the decision is arrived at. I should be doing violence to the language of the section if I introduced into them the words 'after contest' which, I do not find in them." We see no reason to dissent from this view.

Collector of Vizagapatam v. Abdul Kharim Sahib.

We accordingly allow the petition and direct that the plaintiff in the suit do pay the Collector the stamp duty payable on the plaint and the costs of this application. We have dealt with this matter under S. 622, C. P. C., as we are of opinion that the District Judge has failed to exercise a jurisdiction vested in him by law in consequence of a misconstruction placed by him on S. 412, C. P. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr, Justice Benson.

Kuppusami Chetty ... Appellant * (*1st Defendant*)

v.

Papathi Ammal and another ... Respondents (*1st Plaintiff* and *2nd Defendant.*)

Kuppusami Chetty v. Papathi Ammal.

Transfer of Property Act, S. 60, cl. (4)—Partial redemption.

Except as provided in cl. 4, S. 60 of the Transfer of Property Act, no person interested in a portion of the mortgaged property is entitled to redeem his share only on payment of a proportionate part of the money remaining due on the mortgage.

Appeal against the decree of the Madras City Civil Court in O. S. No. 159 of 1895, dated 19th August 1896.

The 2nd defendant and R mortgaged two houses to the father of the 1st defendant in the year 1873 for Rs. 200. Subsequently, one of the two houses was sold in execution of a decree against the 2nd defendant, and R and the plaintiff in this suit bought the house from the purchaser in execution. The 1st defendant's father being dead, the plaintiff now sued 1st defendant to redeem his house alone on payment of half the mortgage money. The Judge of the City Civil Court decreed the plaintiff's suit. The 1st defendant then appealed to the High Court.

P. R. Ganapathi Aiyar for appellant.

T. S. Ramanuja Charriar for 1st respondent.

The Court delivered the following

JUDGMENT:—The Judge is in error in supposing that the plaintiff having purchased a portion of the mortgaged property is

* C. C. C., Appeal, 1 of 1897. 29th November 1897.

at liberty to redeem that portion only without redeeming the rest. This is clear on principle, and is expressly enacted in the last clause of S. 60 of the Transfer of Property Act. (See also *Tadigotla Timmappa* v. *Lakshmamma*, I. L. R., 5 M., 385). S. 82 of the Transfer of Property Act on which the Judge relies does not permit the redemption of a mortgage piecemeal. It merely provides for contribution towards the mortgage debt rateably by each of several properties when they are owned by different mortgagors, or when being all the property of one mortgagor, there are prior encumbrances on some of the properties. (See also *Roghu Nath Pershad* v. *Harlal Sadhu*, I. L. R., 18 C., 320). We must, therefore, reverse the decree of the lower Court and dismiss plaintiff's suit with costs throughout.

Kuppusami Chetty v. Papathi Ammal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Mithala Cheruvittil Mammod ... Appellant* (*Judgment-debtor*).

v.

Locke and another ... ... Respondents (*Decree-holder* and *Auction-purchaser*).

Mithala Cheruvittil Mammod v. Locke.

Civil Procedure Code, S. 244—Questions relating to execution of decree between auction-purchaser and judgment-debtor.

An order passed in execution of a decree and which decides a dispute which concerns only the judgment-debtor on the one hand, and the auction-purchaser on the other, is not to be deemed an order passed under S. 244, C. P. C., and is, therefore, not appealable.

Under a mortgage deed a plot of land and certain buildings thereon were mortgaged. The mortgagee got a decree on his mortgage and in execution of that decree the properties were purchased by a third person. But before the certificate was issued to him, disputes arose as to whether the land alone was sold as contended for by the judgment-debtor or whether the buildings also were included in the sale as contended for by the auction-purchaser. The Court after hearing all the parties including the decree-holder passed an order to the effect that all the mortgaged properties were sold.

Held: that no appeal lay from this order as it was one which affected only the auction-purchaser and the judgment-debtor and as such was not one falling under S. 244, C. P. C.

Prosanno Coomar Sanyal v. *Kasi Das Sanyal*, 19 I. A., 166, distinguished.

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* C. M. S. A. No. 22 of 1897. 2nd September 1897.

Mithala Cheruvittil Mammod v. Looke.

Appeal against the order of the District Court of South Malabar in C. M. A. No. 65 of 1896, confirming the order of the Subordinate Judge's Court of Cochin in M. P. No. 332 of 1896, (O. S. No. 9 of 1896).

The facts of the case appear sufficiently from the judgment of the Court.

P. R. Sundara Aiyar for appellant.

K. R. Subrahmania Sastri for respondents.

The Court delivered the following

JUDGMENT :—Certain immovable property was sold by the Subordinate Court of Cochin in execution of a decree obtained by the Cochin Municipal Commissioners against the appellant upon a mortgage instrument executed by him. The sale was confirmed. But before the certificate of sale was issued, disputes arose as to whether certain buildings should be included in the certificate as part of the property sold. After hearing the auction-purchaser, the judgment-creditor and the judgment-debtor, the Subordinate Court passed an order directing that the buildings should be included in the certificate. The appellant preferred an appeal against the order to the District Court. The appeal, however, was rejected on the ground that no such appeal lay. On behalf of the appellant, it was contended that the view taken by the District Court was wrong inasmuch as the question in dispute was one which fell under S. 244 of the Code of Civil Procedure.

This contention is, in our opinion, untenable. Now, if the dispute involved the question of the validity of the sale, the case would, no doubt, be governed by the ruling of the Judicial Committee in *Prosanno Coomar Sanyal* v. *Kasi Das Sanyal,* 19 I. A., 166. But the sale was not, and could not have been, impeached by any of the parties at the time when the order in question was passed. The dispute was, and is, as to whether under the sale the right to the land mentioned in the sale certificate alone passed to the auction-purchaser as the appellant contends or whether, as the purchaser contends, the right to the buildings also passed. If the former contention be upheld, the party that would be affected thereby would be the purchaser. If, on the other hand, the latter contention prevailed, it is the appellant that would suffer by such

decision. In neither case, the sale itself being valid, would the judgment-creditor's rights be in any way touched. There is, therefore, in this case no question in dispute between the judgment-debtor on the one side and the judgment-creditor on the other as urged for the appellant. The question in dispute is really one between the judgment-debtor and the purchaser only. S. 244 of the Code does not, therefore, apply and the conclusion of the District Court is right.

Mithala Cheruvittil Mammod *v.* Locke.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Muthappudayan and another. } Appellants * (*Defendants 1 and 2*).

v.

Ammani Ammal ... ... Respondent (*Plaintiff*).

Hindu Law—*Stridhanam*—Mitakshara—Paramount authority.

Where authority of the Mitakshara is paramount over the authority of the other commentaries obtaining in this Presidency, the word *stridhanam* is not technical and is to be understood to have the wider significance given to it in the Mitakshara (ch. II, Sec. 11, pl. 1); and except in the case of *sulka*, (Ch. II, Sec. 11, pl. 14), (1) follows the general rule of devolution expounded therein (ch. II, Sec. 11.)

Muthappudayan *v.* Ammani Ammal.

A Hindu father gave some property to his daughter S after her marriage. She died leaving a son and a daughter surviving. In a suit by the daughter of S for the recovery of the inheritance from the son;

Held: that the gift of the property to S by her father made it her *stridhanam*; that after the death of S the inheritance devolved on her daughter in preference to her son;

The distinction recognized in the Smriti Chandrika between different kinds of *stridhanam*, *e.g.*, *Yautaka*, *Anvadheya*, &c., as regards devolution, not followed.

Second appeal against the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in A. S. No 97 of 1896, modifying the decree of the Court of the District Munsif of Namakal in O. S. No. 241 of 1895.

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* S. A. No. 488 of 1897. 23rd November 1897.

(1) [Also the wealth of an unmarried girl; ch. II pl. 1 Ed. Note].

Muthappudayan v. Ammani Ammal.

The facts of the case appear sufficiently from the judgment of the Court.

P. S. Sivaswami Aiyar for appellants.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—Certain property was given to one Sellayi by her father after her marriage. She died leaving a son and a daughter her surviving. Both the Courts below have held that the plaintiff who is the daughter of Sellayi was entitled to the inheritance to the exclusion of her brother.

The rule of succession for such a case is clearly stated in the Mitakshara. The author after mentioning the various sorts of woman's property recognized by Manu and others and referring particularly to gifts made after marriage, proceeds to discuss the distribution of such property. "In all forms of marriage" he says "if the woman leave progeny" that is, if "she have issue, her property devolves on her daughter or her daughters." Then he explains the matter further declaring that unmarried daughters are to take first, but on failure of them married daughters. He cites Gautama as an authority—"A woman's property goes to her daughter unmarried or unprovided." Then he gives the exception from the rule "But this is exclusive of the fee or gratuity." For that goes to brothers of the whole blood, conformably with the text of Gautama: "the sister's fee belongs to the uterine brothers after the death of the mother." (Chapter II, S. 11, verse 14). In the woman's property governed by the general rule is included that which is bestowed after marriage. And thus if the authority of the Mitakshara is to prevail, judgment has been rightly given in the plaintiff's favour whether or not the gift in this particular case is correctly denoted by the name *Anvadheya*.

Looking to the work of Yajnavalkya which forms the subject of Vignanesvara's commentary, we find ample foundation for the view taken by him. "After the death of the parents, the sons should divide equally their wealth and debt. The daughters share the residue of their mother's property after the payment of her debts, and the issue succeed in their default." (Verse 117, Mandlik's translation, page 214). And again "The property of a childless

woman married in the *Brahma* or any other of the four approved forms of marriage goes to her husband; in the remaining four forms of marriage, it goes to her parents. But if she leave issue, it will go to her daughters." (Verse 145, *ib.* p. 224). Among the Smriti writers there is further in support of the same view the text of Gautama already cited (Chapter XXVIII, verse 24, vol. 2, Sacred Books, page 302) and the text of Vishnu which runs as follows:—Chapter XVII, verse 18, "What has been given to a woman by her father, mother, sons, or brothers, what she has received before the sacrificial fire, what she receives on supersession, what has been given to her by her relatives, her fee (*sulka*) and a gift subsequent, are called woman's property (*stridhana*)." Verse 19, "If a woman married according to one of the first four rites, beginning with the *Brahma* rite, dies without issue, that (*stridhana*) belongs to her husband." Verse 20, "If she has been married according to one of the other rites, her father shall take it." Verse 21, "If she dies leaving children, her wealth in every case goes to her daughter"; and lastly Narada says: "Let daughters divide their mother's wealth; or, on failure of daughters, their male issue." Coming now to the other commentators whose treatises are current in Southern India, though not carrying the weight which is due to the Mitakshara (Strange's Hindu Law, page 11) we find that it is only in the Smriti Chandrika that a view directly opposed to that already stated is put forward. According to the Sarasvathi Vilasa in which the subject is discussed at length it is to the daughters that woman's property is to go; and the same reason is given as is put forward in the Mitakshara (Chapter I, section 10) "because of the preponderance of the woman's members in the daughters" (section 138). The exception in the case of *sulka* is recognized (section 311; see section 136, &c., section 332). The same view seems to be taken in the Madhaviya so far as gifts from the father and his family are concerned. (See section 10, page 10, Burnell's translations and section 50). The text of Manu, "On the mother's death let all the uterine brothers and sisters divide equally the maternal wealth" is explained to mean, not that sons and daughters jointly succeed, but that there is to be an equal division if the sons do succeed. A similar construction is put on the text in Sarasvati Vilasa (paragraph 310, page 62). Varadaraja's commentary is perhaps not quite so clear. Dealing with the same text, after citing

Muthappudayan v. Ammani Ammal.

the text of Gautama and that of Yajnavalkya, he says with reference to the latter: "In default of daughters, the descendants, (*i.e.*,) sons should take it, such is the meaning"—and then cites Narada's text. Further he contrasts *yautaka*, that which is received by the mother from her family and which the daughters share, with *stridhana* received from her husband's family. As to this latter he says: "The sons and daughters are equal because of their *Sapindaship*." He draws the same distinction as Madhaviya between what is received from the husband's family and that received from her own family.

So much for the commentaries which have been translated. Dr. Jolly observes that the unpublished digests of the Mitakshara school agree more or less with the Mitakshara (Jolly's Tagore Lectures, page 268). In spite of this consensus of opinion it is argued upon us that we ought to follow the Smriti Chandrika and recognize the distinction which is there made between three classes of *stridhanam*. One class is that called "*yautaka*" property given by any one to the bride and bridegroom while seated together at a marriage or the like when unmarried daughters alone succeed. The second class includes what a woman has received after marriage (*anvadheya*) and what her lord may have given her through affection (*Prithidatta*). For that class the devolution is prescribed in S. 9 (Chapter IV, Verse III). Thirdly, there is maternal property not included in the above kinds which devolves on the daughters only in the first instance. According to the commentator it is to this class only that the text of Gautama applies. It is by no means clear that the property in the present case can be accurately called *anvadheya*—the doubt is as to whether the term includes property given by the father as well as property given by the father's family (verse 195, Chapter IV, Manu, and verse 5, Chapter IX, S. 1, G. Banerjee, page 278). We think we may pass by that question as also the question whether Devanda Bhatta's interpretation of the text of Manu is or is not the correct one. It may be that his view represents a re-action against the admission of women to the enjoyment of proprietary right (see Jolly's Tagore Lectures, page 262). Certainly the Smriti Chandrika is far less favourable to women than the Mitakshara. And it was argued that because the Courts have refused to follow the latter in dealing with the case of property inherited by a woman, we should, therefore, give preference to the

Muthappudayan v. Ammani Ammal.

authority of the Smriti Chandrika in the present instance. The grounds, however, on which the cases deciding the point proceed (*Bachiraju* v. *Venkatappadu*, 2 M. H. C. R., 402; *Sengamalathammal* v. *Velayuda Mudali*, 3 *ib.* 314—other cases in Mayne's Hindu Law, S. 567) do not affect the general authority of the Mitakshara on the question of *stridhan*. They afford no reason why in the present instance in which the Mitakshara does not stand alone and unsupported, the views propounded in it should give way to those expressed in the Smriti Chandrika. A practical objection to the latter is that the adoption of them would complicate the law of inheritance and render the solution of many questions more difficult than would be the case if the Mitakshara were followed, for in dealing with *anvadhaya* and *prithidatta,* the author of Smriti Chandrika contents himself with stating how it should devolve in the first instance and makes no provision for the case in which there is a failure of sons as well as daughters (see Tagore Lectures, G. Banerjee, page 398).

We have been unable to find any decided case in which the question has been expressly raised. In *Bhujanga Rau* v. *Ramayamma*, I. L. R., 7 M., 387, however, the point might have been, but was not, taken. There a village had been given by a husband to his wife as a mark of affection (*Prithidatta*) and on the death of the parents the question arose whether the daughter or the son in whose favour the mother had made a gift by will was entitled. Other questions were argued, but it was assumed that the daughter was the heir of her mother and the suit was decided in her favour. This was a case in which according to the Smriti Chandrika (S. 6, Lecture III, Chapter IX) the son and daughter should unquestionably have taken together because the property came within the second of the classes mentioned above.

We think the question has been rightly decided and, therefore, dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Salamma ... ... Appellant * *(Plaintiff)*.

v.

Lutchman Reddi and another } Respondents *(Defendants)*.

Salamma *v.* Lutchman Reddi.

Hindu law— *Stridhanam*, definition of, in Mitakshara—Wife's acquisitions from strangers, nature of—Devolution of *stridhanam*—Enfranchisement in the name of a married woman.

Under the Hindu law, as administered in this part of India, the word *stridhanam* must be taken to have the wide significance attached to it in pl. **1**, S. 2, ch. II, of the Mitakshara, *i.e.*, to denote whatever is lawfully acquired in any manner by a woman married or not, and to follow the special lines of devolution as the case may be as prescribed by the Mitakshara, except in cases where either a consensus of opinion among the later commentaries prevalent have, or a course of judicial decisions has, established a different rule.

The holder of the office of Maniem in a Government village was dismissed for embezzlement. He was one of two brothers who together constituted a joint Hindu family. Sometime after his dismissal, the Government enfranchised the inam attached to the office in the name of his wife. In a suit by his daughter, after his wife's death, instituted against him and his brother, for the recovery of the property so enfranchised;

Held: that the inam after the enfranchisement became the wife's *stridhanam* in which the husband had no such joint-right as would make him take it by survivorship after her death, and that after her death the proper heir to the inam was her daughter, the plaintiff, and not her husband.

Second appeal against the decree of the District Court of North Arcot in A. S. No. 336 of 1895, reversing the decree of the Court of the District Munsif of Chittoor in O. S. No. 395 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

C. Jambulinga Mudaliar and *P. M. Sivagnana Mudaliar* for appellant.

T. S. Tyagaraja Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT:—The land in dispute formed part of the emoluments attached to the office of *Maniem* in a Government village.

* S. A. No. 397 of 1896. 30th November 1897.

Salamma v. Lutchman Reddi.

The second defendant formerly held the office, but having been found guilty of embezzlement he was dismissed. The land was a few years afterwards enfranchised in favour of his wife, Ellammal, since deceased. With reference to the issue remitted for trial, *viz.*, what right, if any, and under what circumstances the land was enfranchised in favour of Ellammal, the District Judge states in effect that the evidence does not enable him to do more than find that the enfranchisement took place because Ellammal was in possession of the land at the time.

The District Munsif gave a decree to the plaintiff, being of opinion that she, as the unmarried daughter of Ellammal, was her heir and entitled to the property. But the District Judge on the strength of an observation contained in S. 616 of Mayne's Hindu Law, held that the property, though acquired by Ellammal, became on her death the second defendant's in his sole right and that the plaintiff had no title to it.

The chief authority relied on in support of the lower appellate Court's decision is a text of *Katyayana.* As translated it runs thus:— "Wealth acquired by mechanical art or received through affection from any but the kindred is subject to the husband's dominion. The rest is *stridhanam.*"

Whether an acquisition such as that in the present case falls within either of the two classes mentioned in the text is open to doubt. For it can scarcely be said with any degree of accuracy that the land was acquired by mechanical arts or was received through affection entertained by the Government towards Ellammal. But it has been suggested that the text was intended to cover all acquisitions which are not *stridhana* in the technical sense of the term as understood by *Smrithi* writers. We propose, therefore, to deal with the present case on the supposition that it comes within the spirit of the rule laid down by the text.

The first question then that arises is, in whom is the ownership of property of the kind mentioned in the text—is it in both husband and wife or in which of the two?

The language of the text may seem to vest the ownership in the husband. But it being well established that whatever may be the law intended to be laid down by the *Smrithi* writers, that law

Salamma v. Lutchman Reddi.

must be sought for in the writings of the commentators, we have to look to what those commentators, who are authorities in this part of India have said on the subject.

At the outset we may state that no commentator, known to us by name, has said that the ownership vests in both husband and wife. But Mr. Mayne, in the line of devolution pointed out by him would seem to assume the joint ownership of both. In support of this, he refers to Jagannatha, 3, Digest 628. No doubt we find therein a statement that the property goes to the survivor and afterwards passes to his or her heirs. But Jagannatha simply mentions this as the opinion of certain lawyers. Who these are does not appear. Jagannatha's own opinion, as will be shown further on, would seem to be different. Under these circumstances it is not safe to assume the joint ownership so as to allow the survivor to take the property.

If the property does not belong to both, to whom then according to the commentators does it belong? First and foremost comes the *Mitakshara*. It is significant to note that Vignanesvara does not refer to the text at all nor was it necessary, for him, in the view he took of the subject of *stridhanam*, to refer to it. For according to him whatever is lawfully acquired in any manner by a woman married or not—is her *stridhanam*. The *Smrithi Chandrika*, however, does not seem to recognize property of the kind mentioned in the text as her *stridhanam*. (The translator of the work was evidently of that opinion). The Madhaviya and Varadaraja's *Vyavahara Nirnayam* cite the text but express no opinion on it. The *Saraswathi Vilasa* like the *Mitakshara* does not refer to the text and would seem to follow the *Mitakshara*. The author of the *Viramitrodaya* expressly recognizes such property as her *stridhanam*. For he says, "The answer is, in the above texts" (one of which is that in question) "the denial is not of their being woman's property but of its consequences such as distribution (by her choice amongst her heirs), &c. Accordingly in the latter text" (the one in question) "it is said therein the husband's ownership arises. The meaning is that the husband and not the woman has independence in dealing with such property." (Golapchandar Sircar's translation, page 222). In this state of the authorities, when there is not such a consensus of opinion among the commentaries prevalent

in this part of India as to suggest that the law of the *Mitakshara* on the point was not recognized or was departed from, it seems to us to be best to follow the *Mitakshara*. No doubt, judicial decisions have established that property inherited by a woman is, notwithstanding the opinion of Vignanesvara to the contrary, not *stridhanam*. But those decisions do not go the length of holding that Vignanesvara's doctrine as to *stridhanam* is otherwise unsustainable.

It is scarcely necessary to say that Vignanesvara's statement that *stridhanam* is to be understood in a technical sense was not a mere philological observation. By laying down that proposition, Vignanesvara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic *smrithi* law and placed women almost on a footing of eqaulity with men as regards the capacity to hold property. It is on account of the boldness and reach of mind evinced by Vignanesvara, as pointed out by Messrs. West and Buhler Digest, page 291, 3rd Edition, in propounding his doctrine of *stridhanam* and his other theories that property is a matter of secular not of religious cognizance and sapindaship rests on consanguinity, that the *Mitakshara* has become the chief authority on Hindu Law. A departure from the law, laid down by such a high authority, must not be made unless supported by adequate grounds. And as no such grounds exist, we hold that the property in the present case belonged to Ellammal and was her *stridhanam* descendible to her heirs. This conclusion is in accordance with that of Jagannatha who is relied upon by Mr. Mayne in support of his view. After referring to the opinion of certain lawyers as noticed above, Jagannatha says in the paragraph immediately following, "But according to Jimuthavahana, Raghunandana and the rest, the wife is the sole owner of wealth acquired by her even during coverture: yet she has not independent power over it so long as her husband lives; for the negative in the text of Manu (Book III, Chapter I, verse 52) conveys the sense of imperfection. Consequently, they have no wealth exclusively their own and the imperfection of their *property* consists in the want of uncontrolled power. It must be, therefore, understood that the legal heirs of a woman's peculiar property succeed also to this wealth." (Higginbotham's Edition, Vol. II, page 608. See Bannerjee's 'Marriage and Stridhanam,' page 319, 2nd Edition, also page 439).

Salamma v. Lutchman Reddi.

The next question is who is the heir to the property? No special rule as to the devolution of the property comprised in the text of *Katyayana* is laid down in any of the commentaries. In this matter of the devolution of *stridhana* too, as in the comprehensive character of the definition of *stridhanam*, the superiority of the *Mitakshara* is evident. While the other commentators, in their attempt to reconcile the various *smrithis*, complicate the matter by prescribing different lines of devolution—those too not complete—according to the class of *stridhanam* to which the particular property belongs, the *Mitakshara* lays down rules which are easy of application, complete in themselves and on the whole equitable. We think, therefore, we ought to follow the *Mitakshara* and hold that the plaintiff is the heir.

It only remains to observe that though, as we have seen, a wife's earnings and gifts to her by strangers are her *stridhanam* descendible to her heirs, yet a question may arise whether her husband has any and what control over such property. That question, however, does not arise in this case and it is unnecessary to consider it.

The decree of the lower appellate Court is reversed and that of the District Munsif restored. The appellant's costs in this and in the lower appellate Court must be paid by the 1st defendant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Boddam.

Sivarama Tevar ... Appellant* (*Assignee-Plaintiff*).

v.

Kovil Arulanantham Pillai and another. ... Respondents.

Sivarama Tevar v. Kovil Arulanantham Pillai.

Limitation Act, Sch. ii, Art. 178—Continuance or revival of applications—Practice o 'striking off' execution applications illegal.

The practice of 'striking off' applications for the purpose of statistical returns is without warrant and is illegal. If a court so 'strikes off' an application without legally disposing of it, the rights of the parties to it are not affected thereby; the application must be regarded as pending notwithstanding its removal from the file.

An application for execution of a decree was made to a court on the 14th April 1893. Immediately after, an injunction issued from another tribunal staying execution of the decree. Thereupon the former court ordered that the application be

* A. A. A. O. No. 23 of 1897. 15th October 1897.

struck off the file, on the 20th July 1893. The injunction was afterwards dissolved in 1896, and on the 6th July of that year the decree-holder applied again for execution. The new application did not in terms ask for a revival or continuation of the former application.

Sivarama Tevar v. Kovil Arul. anantham Pillai.

Held: that the application of the 6th July 1896 was not barred by limitation;

that the application of the 14th April 1893 must be regarded as pending, notwithstanding its being struck off the file; and

that the new application must be taken as one to revive or continue the former although it contained no words to that effect.

Biswa Sonan v. *Binanda Chunder*, I. L. R., 10 C., 417; *Chintaman* v. *Balhastri*, I. L. R., 16 B., 294, followed. *Narayana Nambi* v. *Pappi Brahmani*, *Ib.* 10 M., 23, distinguished.

Appeal against the order of the District Court of Madura in C. M. A. No. 18 of 1896, presented against the order of the Court of the District Munsif of Sivaganga passed in execution petition No. 416 of 1896, (O. in S. No. 315 of 1887).

In O. S. No. 365 of 1887, on the file of the District Munsif of Sivaganga the decree-holder applied for execution on the 14th April 1893, and notices were issued to the necessary parties. After this, some third persons instituted a suit in the Sub-Court of Madura (East) and obtained therein an *interim* injunction staying execution of this decree. That suit was finally dismissed in 1896, and the decree-holder again applied to the Munsif for execution on the 6th July 1896.

This new application did not in terms ask for a renewal or continuance of the former application of the 14th April 1893.

The judgment-debtor pleaded limitation. The District Munsif, however, overruled the objection and allowed the execution to proceed. On appeal, however, the District Judge reversed the Munsif's order and dismissed the application as barred by limitation. The decree-holder then preferred this appeal to the High Court.

V. Krishnaswami Aiyar for appellant.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *S. Gopalaswami Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—The facts of the case are sufficiently stated by the District Judge, but we cannot agree with him in his con-

Sivarama Tevar v. Kovil Arul-anantham Pillai.

clusion that the District Munsif did in fact dispose of the application for execution, dated the 14th April 1893. The District Munsif's order on the petition is "Execution stayed by the Sub-Court; petition struck off the file consequently." Thus the District Munsif struck the petition off his file simply because execution had been temporarily stayed by the Subordinate Court. The District Munsif had no legal authority to dismiss the petition simply because the execution had been stayed, nor did he in fact dismiss it. He struck it off his file, by which, we apprehend, he merely ceased to show it as pending in his statistical returns, but the petition not having been dismissed or otherwise legally disposed of must be regarded as still pending. This was the view taken by *Muthusamy Iyer*, J., in an exactly similar case in A. A. O. No. 34 of 1892, in which he followed the rulings of both the Calcutta and Bombay High Courts. (*Biswa Sonan* v. *Binanda Chunder*, I. L. R., 10 C., 417; and *Ib.* 16 B., 294).

The next question is this:—Are we bound to regard the present application for execution as a new application for execution, or may we regard it as in substance an application to continue the pending proceedings, *i.e.*, the application of the 14th April 1893. In form it is a new application and the decision of the District Judge that it must be dealt with as such is based on the ruling in *Narayana Nambi* v. *Pappi Brahmani*, I. L. R., 10 M., 23. *Parker*, J., was a party to that decision, but in a later case (C. M. A., 108 of 1895), he held that an application similar to that now in question might properly be regarded as an application in continuance of an earlier application and pointed out that in the case reported in I. L. R., 10 M., the application was to attach again the same property which *had been released on an objection petition*, but that in the case before him there had been *no stoppage in the proceedings in execution*. So in the present case we must hold that there has been no legal stoppage in the execution proceedings, and, therefore, the case in I. L. R., 10 M., is not applicable. This view is in accordance with the decisions in *Chandra Prodhan* v. *Gopi Mohun Shaha*, I. L. R., 14 C., 385; *Chintaman* v. *Balhastri*, *Ib.* 16 B., 294, and *Thakur Prasad* v. *Fakirullah*, *Ib.* 17 A., 106.

For these reasons, we consider that the present application may be properly regarded as one in continuance of the application

Sivarama Tevar v. Kovil Arulanantham Pillai.

of the 14th April 1893, which is still legally pending before the District Judge.

We must, therefore, set aside the order of the District Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Sivathi Odayan and another. ... Appellants in No. 905 of 1896 * (*Defendants*).

Sivathi Odayan and another. ... Appellants in No. 906 of 1896 (*Defendants*).

v.

Ramasubbayyar ... ... Respondent in both cases (*Plaintiff*).

Sivathi Odayan v. Ramasubbayyar.

Mortgage-decree for sale—Interest acquired by execution purchaser—Right of previous purchaser to redeem—Condition for so redeeming—Contribution.

N mortgaged some properties to C and afterwards sold part of the properties mortgaged to A, who in turn sold the part to S. Subsequent to the sale to S, C sued on his mortgage, and to this suit S was not made a party. The suit was razied in respect of a part of the mortgage sum proportoinate to the value of the property retained by N and for the rest a decree was passed against N personally and against that part of the mortgaged property sold to S. In execution of this decree, R became the purchaser for a sum much smaller than the decree-amount. In a suit by R against S to recover possession of the property,

Held: that S, not having been made a party to the suit by C against N, ought now to be allowed the same rights that he would have had if he had been joined in the prior suit and ought, therefore, to be allowed to redeem R;

and that such redemption ought to be allowed only on payment by S of a proportionate part of the mortgage-amount due at the date of the prior decree on the part of the mortgaged property purchased by him; and not of the amount paid by R for his purchase in the execution.

Second appeals against the decrees of the District Court of Madura in A. S. Nos. 574 and 575 of 1895, modifying the decrees of the Court of the District Munsif of Sivaganga in O. S. Nos. 169 and 170 of 1895, respectively.

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* S. A. Nos. 905 and 906 of 1896. 30th November 1897.

Siyathi Odayan v. Rama-subbayyar.

The following finding returned by the District Court in response to an order from the High Court requiring the Judge to find the amount due from the defendants to the plaintiff in respect of the mortgage, gives the facts necessary for the purposes of this report:—

FINDING.—The High Court has asked me to find "what is the amount due by defendants 1 and 2 to plaintiff in respect of such redemption."

2. The position is as follows:—

Three items of property were mortgaged by Nagasundaram Chetty to Chidambaram Chetty, *vide* $\frac{A}{3\text{-}7\text{-}85.}$, for 5,000 rupees.

These items are—

(1) 8 pangus in Iyyuruli.

(2) A house in Madura.

(3) $2\frac{3}{4}$ pangus in Pulikkanmai.

After this mortgage, Nagasundaram Chetty $\frac{\text{sold}}{9\text{-}2\text{-}86.}$, item 3—$2\frac{3}{4}$ pangus—to Arulananda Udayan for 990 rupees. Arulananda Udayan sold $1\frac{1}{2}$ pangus to one defendant and one pangu to the other defendant. Thus the defendants have become the owners of the right of redemption in $2\frac{1}{2}$ pangus. Chidambaram Chetty sued in O. S. No. 4 of 1891 to recover the balance of money due on his bond. The suit was razied for 1,050 rupees, and a decree was passed for that amount against the $2\frac{3}{4}$ pangus, and a personal remedy also was given by the decree. In execution, the present plaintiff purchased the $2\frac{3}{4}$ pangus for 270 rupees. Thus the plaintiff is in the position of the first mortgagee as regards the $2\frac{3}{4}$ pangus.

3. Defendants are willing to pay 270 rupees to redeem. Plaintiff, I presume, would have been willing to take a decree for 1,050 rupees, but he now argues through his vakil that he is entitled, as a matter of law, to a proportionate share of the original mortgage, and that, in general, is the view which I hold. The principle laid down in *Dadoba Arjunji v. Damodar Raghunath*, I. L. R., 16 B., 486, is, I think, applicable to the present case. The defendants are allowed to redeem, because they were no parties to O. S. No. 4 of 1891. Had they been parties, their right to redeem would have been on condition of paying what was then due on the mortgage. The amount that plaintiff paid as a purchaser in execution has nothing to do with the matter.

Sivathi Odayan v. Ramasubbayyar.

4. It appears that items 1 and 2 were sold before the decree in O. S. No. 4 of 1891 was pronounced, and the proceeds given to the first mortgagee to partly clear off the mortgage. The decree for 1,050 rupees in O. S. No. 4 of 1891 was the balance—by consent of parties—due on the mortgage.

5. The defendants, had they been parties to O. S. No. 4 of 1891, could have redeemed on paying 1,050 rupees on the date of the decree in that suit. They are now entitled to redeem on the same terms that they could have redeemed, had they been parties to O. S. No. 4 of 1891—in fact, they are entitled to be put into the position they would have been in, had they been parties to O. S. No. 4 of 1891.

6. A proportionate share of the mortgage—on this date—is practically the same as the amount decreed in O. S. No. 4 of 1891 with interest. The calculation would be as follows: Total amount due on mortgage up to this date is Rs. 12,181-10-8. Deducting payments of interest, namely, Rs. 535-0-9, plus Rs. 1,436-10-8, the balance is Rs. 10,209-15-3, or roughly 10,210 rupees. I take the value of 2½ pangus, which plaintiff sues for, to be 900 rupees, and the total value of the mortgaged property to be 6,041 rupees. The proportion is about 1,500 rupees in round numbers.

I am of opinion, for the reasons mentioned above, that plaintiff is entitled to a decree for 1,050 rupees plus interest on that amount at 10 annas per cent. from the date of the decree till the date of payment and this is my finding on the point referred by the High Court.

V. Krishnaswami Aiyar for *P. R. Sundara Aiyar* for appellants.

C. Mahadeva Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We cannot accede to the contention that the District Judge is wrong in holding upon the issue remitted to him that the sum payable by the appellants to the respondent is not Rs. 270, the price paid by latter for the property when he purchased it at the court-sale held in execution of the decree obtained by the mortgagee, but Rs. 1,050, which the Judge found to be the proportion of the mortgage debt chargeable in respect of the property.

Sivathi Odayan v. Ramasubbayyar.

The decision is in accordance with the principle stated in Fisher on Mortgages in the following words :—"The assignee stands in the place of the assignor; and, as the latter might have assigned to him *gratis*, it is but just that the measure of the allowance should be what was due and not what was paid. The assignee taking the hazard should also have the benefit of the bargain, of which neither the mortgagor nor any subsequent incumbrancer can have any equity to deprive him." (5th Edition, section 1734). *Davis* v. *Barret* is one of the modern cases in which the above principle was acted upon. There A devised an estate to his heir who in his own right had a charge on it. The heir bought up an incumbrance on the estate amounting to £11,555 for 2,000£. *Sir John Romilly*, M. R., held that the heir was entitled to the full amount as against other incumbrancers on the estate. In dealing with the contention that the owner of the second charge was entitled to have an account of what was actually paid for the purpose of getting in the former mortgage and of making it stand simply as security for that amount, the Master of the Rolls said: "I am of opinion that the second mortgagee has no such equity against any stranger who might purchase the first charge, and that the owner of the reversion not having created the first or second charge, is, in this respect, entitled to stand in the place of a mere stranger. It would be, as I believe, a new equity and productive of the most injurious consequences, if a second mortgagee were entitled, as against the *bona-fide* assignee of a first mortgage, to insist on an account being taken of what was actually paid for the first mortgage." (14 Beav. at p. 554). In *Macrae* v. *Goodman*, the Judicial Committee held similarly (5 M. P. C. C. 315).

There are, no doubt, exceptions to the rule stated above as when the purchaser occupies a fiduciary position or when there is fraud or collusion. In the present case, however, the respondent was a *bona-fide* purchaser at a court-sale which vested in him the right of the mortgagee in so far as the property in dispute was concerned. The finding of the District Judge must, therefore, be accepted.

The decrees of the lower appellate Court are reversed and those of the District Munsif restored with the modification that the amount payable by the appellants to the respondent is (instead of

Rs. 270) Rs. 1,050 with interest thereon at 10 annas per cent. per mensem from the date of the decree to the date of payment. Each party will bear his own costs in this and in the lower appellate Court.

Sivathi Odayan v. Rama-Subbayyar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Boddam.

Sooryanarayana Pandarathar ... Appellant* (*Legal Representative of deceased Counter-petitioner and 2nd Defendant*).

v.

Gurunatha Pillai ... ... Respondent (*Petitioner and Transfer Plaintiff*).

Sooryanarayana Pandarathai v. Gurunatha Pillai.

Limitation Act XV of 1877, Sch. II, Art. 178—Application for renewal or revival of previous execution application.

When once an application for execution of a decree has been finally and properly dismissed it cannot afterwards be renewed or revived by any fresh application put in for the purpose.

In 1880, S obtained a decree against a Hindu who had been transported for life in 1879, and whose property had been confiscated by Government. In 1881, the Government released its lien on the property in favour of the convict's minor son, the estate being placed under the control of the Court of Wards. On the 19th September 1892, G, the assignee of the decree, applied for its execution against the property in the hands of the minor son. The petition was dismissed, the decree-holder being referred to a regular suit. G then filed a suit and got a declaration that he can execute the decree against the property in the son's hands; and on 3rd October 1895, applied for a restoration of the petition of 19th September 1892, and for the sale of the property.

Held: that the application of the 3rd October 1895 was barred as it had been made more than three years from the previous application of the 19th September 1892.

In 1879, the late zemindar of Gandarvakottai was sentenced to transportation for life for abetment of dacoity. On the 20th September 1880, one Sesha Iyengar got a decree against him (O. S. No. 109 of 1880). In 1881, the Government, which had declared the estate to be forfeited to Government, released its lien thereon in favour of the zemindar's minor son, the estate being placed under the Court of Wards.

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* C. M. S. A. No. 28 of 1897. 22nd October 1897.

Sooryanarayana Pandarathar v. Gurunatha Pillai.

Seshaiyangar made a series of attempts to execute his decree. The first four applications were all against the minor. They are dated 17th September 1883, 17th September 1886, 25th September 1889, and 21st June 1892. All were dismissed, for reasons which are now of no consequence.

Seshaiyengar died, and in 1892, his heir transferred the decree to one Gurunada Pillai, who is the present petitioner. On the 19th September 1892, this plaintiff put in the 5th execution petition. This time, it was against the former zemindar, who was then still alive. The Court of Wards objected and the petition was again dismissed, the petitioner being referred to a regular suit. Then plaintiff filed a suit (O. S. No. 632 of 1892), to have his right established to execute the decree against the zemindar's property in the hands of the Court of Wards and got a decree declaring his right so to execute. Having obtained the declaration, he made an application on the 3rd October 1895, praying that the Court will be pleased to restore to its file the petition, dated 19th September 1892, and to order that the immovable properties may be attached and sold. The Munsif held that the application was not barred as one for renewal of the previous application, but dismissed it on the ground that the previous application itself had been barred. On appeal, the District Judge concurred with the Munsif in holding that the present application was not barred, but he held that the point on which the Munsif dismissed the application was *res judicata* between the parties, the point not having been raised by the judgment-debtor on the previous occasion. The judgment-debtor then preferred this appeal to the High Court.

Appeal against the order of the District Court of Tanjore in C. M. A. No. 19 of 1896, reversing the order of the District Munsif of Tanjore in execution petition No. 789 of 1895, in O. S. No. 103 of 1880.

C. R. Pattabhirama Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal from the District Judge of Tanjore allowing an execution petition on the ground that though dated more than three years after the last preceding application, it is in effect a mere revival or continuation of it,

In June 1892, the respondent had put in a petition which was dismissed, the petitioner being relegated to a regular suit to establish his right. He did not bring a suit, but in September 1892, put in a fresh application to execute. This was dismissed as he had not chosen to take the course suggested when his previous application had been dismissed. After this, the respondent filed his suit to have his right established, and that suit ended in his favour on the 18th March 1895. On the 3rd October 1895—more than 3 years after his last petition was dismissed—he put in the present application, asking to have the former application of September 1892 revived or continued. Both the Courts held that this application was not barred, because it was in effect a mere revival of the last previous application.

We think this decision wrong. Had there been any reason for saying that the proper order on the hearing of the last application should have been one which could hold the decision in suspense pending the decision of the regular suit, it might well be that there would be some reason for saying that this application could be treated as an application to proceed with a pending application; but that is not the case here. The only proper order that could have been made in the circumstances was an order absolutely dismissing the application inasmuch as the order that preceded it had relegated the petitioner to a regular suit which he had not chosen to bring. We cannot, therefore, view the decision as one suspending the application for execution, nor can we agree that where an order finally and properly dismisses an application for execution, a fresh application for execution can be treated as a renewal of it, even though such application may contain apt words for the purpose. Moreover, we know of no process by which an application which has properly been dismissed can be revived.

For these reasons, without going into the other contentions raised, we allow the appeal.

We reverse the order of the District Judge and restore that of District Munsif. The respondent must pay the appellant's costs in this and the lower appelate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Arunachalam Chetti ... Appellant* (*Plaintiff*).

v.

Meyyappa Chetty ... Respondents (1*st*, 3*rd* *and* 4*th Defendants*).

Arunachalam Chetti *v.* Meyyappa Chetty.

Civil Procedure Code, Ss. 13. (*expl.* ii) 42, 43, 244, 462—*Res judicata*,—Cause of action —Compromise on behalf of minor without leave—Right of next friend to set aside compromise on behalf of minor.

The next friend of a minor in a suit cannot validly compromise it without the previous sanction of the court enabling him to enter into such a compromise. The mere fact that a court passes a decree in accordance with an unauthorized compromise does not amount to leave being given within the meaning of S. 462, C. P. C.

The right to avoid a compromise entered into on behalf of a minor by his next friend in a suit, can be exercised not only by the minor himself on coming of age, but also during his minority by a next friend on his behalf.

Explanation ii to S. 13, C. P. C., in authorizing a fiction that the matter contemplated by it was in issue, necessarily implies the further fiction that it was adjudicated upon.

In 1879, a suit was compromised on behalf of A, a minor by his next friend, but without the previous sanction of the court which, however, passed a decree in accordance with the compromise. In 1882, another next friend of A sued the same defendant to set aside the decree on the ground of fraud on the part of the person who had formerly acted as next friend. That suit was thrown out on the ground that no fraud was proved. In 1884, another attempt was made in execution, to impeach the same decree on the allegation that it had been obtained without leave.

The objection was there overruled on the ground that the sanction had been impliedly given.

In a suit by A, in 1896, within three years of his attaining his majority, to set aside the compromise decree on the ground that it had been obtained without leave of court and was consequently not binding on him :

Held, that S. 244 was no bar to the suit as the question whether sanction was given or not, being one going to the very root of the decree passed on the compromise, was such as could not be raised in *execution* of the decree;

that the cause of action alleged in the present suit was either identical with or formed part of the cause of action put forward in the suit of 1882, and was therefore, matter which ought to have been made a ground of attack in the former suit and that, consequently, the present suit was barred as *res judicata*.

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* A. No. 32 of 1897. 16th November 1897.

Appeal against the decree of the Subordinate Judge's Court of Madura (East) in O. S. No. 50 of 1895.

The facts of the case appear sufficiently from the judgment of the Court.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*), *V. C. Desikachariar* and *P. R. Ganapathi Aiyar* for appellant.

P. R. Sundara Aiyar and *C. Venkatasubbaramaiya* for 1st respondent.

The Court delivered the following

JUDGMENT:—*Subramania Aiyar, J.*—Murugappa Chetti, the deceased father of the present 1st defendant (1st respondent), sued the plaintiff (appellant) in O. S. No. 42 of 1879 for a sum of money alleged to be due by the father of the plaintiff, the late Ramasami Chetti. The plaintiff, being then a minor, was represented in the suit by his mother and guardian *ad litem*. At first she contested the suit, but during the trial she entered into a compromise consenting to the sum claimed being decreed against the estate of the plaintiff, the father of the 1st defendent giving up his costs. A decree was given in accordance with the compromise. In 1882, litigation again arose between the plaintiff and the 1st defendant's father. One Palaniappa Chetti, as the next friend of the present plaintiff, instituted O. S. No. 48 of 1882 against the 1st defendant's father for the purpose of setting aside the decree in the previous suit No. 42 of 1879, on the ground that it had been obtained by fraud practised on the plaintiff's guardian *ad litem*. In the course of the suit, Palaniappa Chetti was removed from the position of next friend and the present 3rd defendant was appointed in his stead. The 3rd defendant carried on the litigation with the result that the suit was dismissed, it being found that no fraud was made out. Another attempt to get rid of the decree in suit No. 42 of 1879 was made in 1884, by an application purporting to be made in that case itself. In the application, the point taken was that the compromise was entered into without the sanction of the court as required by S. 462 of the Civil Procedure Code; but the Subordinate Judge, who heard the application, rejected it holding that, in effect, though not expressly, sanction has been

Arunachalam Chetti v. Meyyappa Chetty.

given. An appeal was preferred to the High Court against the order rejecting the application. The appeal was, however, dismissed for the reason that against such an order no appeal lay. The plaintiff having since come of age, has instituted the present suit praying that the decree in suit No. 42 of 1879 be set aside and the sums, collected in execution of the decree, be made good to him by the 1st defendant. In the lower Court the plaintiff relied in support of his case, both on the fraud by which his mother was said to have been induced to enter into the compromise and on the want of sanction. He further alleged that suit No. 48 of 1882 was a mere sham proceeding carried on in collusion between the plaintiff's next friends on the one hand and the 1st defendant's father on the other and that, therefore, the adjudication therein was not binding upon the plaintiff. On all the main questions raised, the lower Court found against the plaintiff and dismissed the suit.

Here on appeal the learned Advocate-General, on behalf of the plaintiff, did not press the ground taken against the finding of the lower Court that the fraud alleged with reference to the decree in suit No. 42 of 1879 was not established. He contended, however, that the lower Court was wrong in holding that the compromise had been sanctioned and urged that the decree in suit No. 42 of 1879 should be vacated on the ground of want of sanction.

We agree with the Advocate-General that no sanction was given for the compromise as alleged for the 1st defendant. There is absolutely nothing to show that any application for sanction was made to the Court. The little evidence that has been adduced upon the point clearly indicates that the decree was passed, upon the compromise without the Court considering or determining the question whether sanction should be accorded or refused. It is scarcely necessary to add that the mere passing of the decree on the compromise does not amount to sanction being given within the meaning of the law. And in the circumstances of this case, it would be wrong for the Court to presume on the ground of lapse of time that sanction was given. The plaintiff would, therefore, be entitled to the principal relief claimed if he is not, as was urged for the respondent, precluded from relying on the absence of sanction either by the order of 1884 already referred to, or by the

decision in O. S. No. 48 of 1882. That the order of 1884 does not operate as a bar is quite clear. The question whether sanction was given or not, being one going to the very root of the decree passed on the compromise was such as could not be raised in execution of the decree. The order was, therefore, one which did not come under S. 244 of the Civil Procedure Code. No doubt if an application for review of the decree passed on the compromise, had been made to the Judge, who passed the decree, he could have entertained the application and set aside the decree for the reason that the requisite sanction had not been given. But the application, on which the order of 1884, was passed, was made to the successor of the Judge who passed the decree. The successor had, under S. 624 of the Civil Procedure Code, no power to entertain an application for review on the ground of absence of sanction. The order thereon was, therefore, manifestly *ultra vires* and could not affect the plaintiff.

The next and the real question in the case is whether the plaintiff is precluded from relying upon the want of sanction by the decision in O. S. No. 48 of 1882. In arguing that the plaintiff was not so precluded, the Advocate-General questioned the lower Court's finding that the last mentioned suit was not a sham and collusive proceeding. We are, however, unable to accede to the contention. The sole evidence on the point is that of the 3rd defendant. The story that, without any intelligible reason for the vile conduct which the 3rd defendant imputes to himself, he joined the first defendant's father and others to defraud the plaintiff, the infant son of the 3rd defendant's late master and kinsman, is so improbable that we cannot but reject it. The lower Court was, therefore, in our opinion, right in discrediting the 3rd defendant's testimony and coming to a conclusion on the point against the plaintiff.

What then is the effect of the decision in that suit (48 of 1882), upon the plaintiff's right to impeach the decree in suit No. 42 of 1879? Is it a bar to the plaintiff's present suit? In urging that it was not, the Advocate-General contended that the right to avoid the compromise on the ground of want of sanction was exercisable only by the plaintiff on his ceasing to be a minor, but not by any next friend on his behalf. There is, however,

Arunachalam Chetti v. Meyyappa Chetty.

absolutely nothing in the language of S. 462 of the Civil Procedure Code to warrant the view that the right to impeach a compromise entered into contrary to its provisions is of the peculiar character contended for. Nor was any authority cited to support the contention. And in reply to the argument that, if persons, interested in a minor, were not allowed to question a compromise entered into on his behalf without the requisite sanction, minors would in general be very seriously prejudiced, all that the Advocate-General could and did say was that it is perhaps open to courts to treat such a matter as one involving an election on the part of the minor concerned and to determine whether in the interest of the minor the compromise shall or shall not be repudiated. It is scarcely necessary to observe that no statutory provision giving to courts authority to exercise such special and extraordinary power exists, and in the absence of such provision no tribunal in the country can take action of the kind suggested. The Advocate-General next contended that, even supposing the right to impeach the compromise for want of sanction may be exercised by a next friend, such want of sanction was not a matter which might and ought to have been made a ground of attack under explanation ii of S. 13, Civil Procedure Code. His arguments on this point may be shortly stated thus:—On the analogy of the decision of the Judicial Committee in *Pittapur Raja* v. *Surya Rao*, I. L. R., 8 M., 520, relating to the construction of S. 7 of the Civil Procedure Code of 1859, corresponding to S. 43 of the present Code, a plaintiff is not required under S. 13 of the latter Code to combine all the causes of action available at the date of the suit and which would entitle him to the relief therein claimed. What S. 13 obliges a plaintiff to do is to rely upon all the grounds necessarily connected with the particular cause of action on which the plaintiff chooses to sue. In determining what such grounds are, courts should have regard to such cases as *Cooke* v. *Gill* (L. R., 8 C. P. 107) and *Read* v. *Brown* (22 Q. B. D., 128) explaining what constitutes a cause of action. According to them the want of sanction now relied on did not form a constituent part of the cause of action alleged in suit No. 48 of 1882, which was founded on fraud alone. The evidence required to sustain such a suit is not the same as that required to support a suit wherein the ground of attack is entirely different, *viz.*, want of sanction. The compromise, though in fact a single act, yet in

point of law it amounted to a violation of two distinct rights vested in the plaintiff, and on the authority of *Brunsden* v. *Humphrey* (14 Q. B. D., 141) the plaintiff must be held not precluded by an adjudication in the suit, instituted with reference to the violation of one of those rights, from maintaining a subsequent suit in regard to the violation of the other right. Lastly, if a want of sanction was a matter which might and ought to have been made a ground of attack in the suit of 1882, still, as it was not adjudicated upon, it could not be held on the authority of *Kailash Mondul* v. *Baroda Sundari Dassi*, I. L. R., 24 C., 711, to operate as *res judicata*.

The argument on the other side was briefly as follows:—Such cases as *Cooke* v. *Gill* and *Read* v. *Brown* deal with what a cause of action is with special reference to such questions connected with *venue*. The definition of a cause of action adopted with reference to such questions is not a proper guide in dealing with matters bearing on *res judicata*. Nor are the cases decided under S. 7 of Act VIII of 1859, or S. 43 of the present Code pertinent in cases like the present. Even under S. 2, Act VIII of 1859, which expressly used the term "cause of action", their Lordships of the Judicial Committee put upon that term a wide interpretation in *Woomatara Debia* v. *Unnopoorna Dassee*, 11 B. L. R., 158, where they held that the plaintiff who failed to obtain judgment for the possession of land claimed by her in her first suit as *taufir* or accretion could not bring a fresh suit claiming the same land as property belonging to her taluk according to the true boundary line. Their Lordships in their judgment referred to the rule that when a man claims an estate and the defendant being in possession resists that claim, he is bound to resist *upon all the grounds that it is possible for him according to his knowledge then to bring forward* (11 M. I. A. at p. 72) as one fully applicable to plaintiffs also—a proposition which is adopted in explanation ii, Section 13. Finally supposing the narrow view contended for by the Advocate-General were correct, still the cause of action alleged in O. S. No. 48 of 1882 was precisely the same as that now relied on and that the fraud on which suit No. 48 of 1882 rested and the want of sanction on which stress is now laid were nothing more than different ways of supporting but one alleged infringement of the plaintiff's right.

Arunachalam Chetti v. Meyyappa Chetty.

In support of the arguments urged on both the sides, decided cases other than those referred to in the above summary were also cited. It may be conceded that the language employed by the Courts is not always uniform. The diversity which exists is probably due, speaking generally, to the difference in the standpoints from one or other of which the question is dealt with. These are well explained in *Anpurna Bai's* case (I. L. R., 11 B., 160, note). There, *West*, J., observes: "Under systems such as the Roman Law or the English Common Law, in which the development of legal rights and duties has been greatly influenced by the re-action of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognizes as justifying an exercise of the coercive power of the State; but as the variety of human relations greatly exceeds that of the conceptions, upon which a system of actions can be framed, it happens that the same transaction or group of circumstances may furnish a ground of several different actions. In such cases different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made a basis of repeated proceedings, the complaining party is allowed to frame his complaint in various ways and the rule obtains that all the circumstances which exist when the former of the two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is substantially the same—*Hitchin* v. *Campbell*, 2 W. Bl. 831; *Martin* v. *Kennedy*, 2 Bos & Pul 69. Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case unfettered by artificial restraints and seek all remedies that the court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever

Arunachalam Chetti v. Meyyappa Chetty.

Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Courts' interference" (*Ib.* 165). The wider view expressed in the latter part of the above quotation is evidently the view which the Judicial Committee had laid down in *Woomatara Debia* v. *Unnopoorna Dassee* cited for the 1st defendant and this is strengthened by the observation made by the same tribunal in *Kameswar Pershad* v. *Rajkumari Rattan Koer*, that the state of the law at the time S. 13 of the present Code was enacted, was that persons should not be harassed by continuous litigation about the same subject matter (I. L. R., 20 C. at p. 86). There can be no doubt that explanation ii to S. 13 was put in to emphasize this wider view, and this is rendered as clear as it can possibly be by another section of the Code which like explanation ii found a place for the first time in the Code of 1877, in which the provisions as to *res judicata* were amplified practically as they are now. That section is section 42 which provides that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute and so to prevent further litigation concerning them. In short, the omission by the Legislature of the term "cause of action" upon which the point turned in S. 2 of Act VIII of 1859 from the corresponding section of the present Act, the insertion therein of a more definite term, *viz.*, "matter directly and substantially in issue," the introduction of the comprehensive words "subjects in dispute" in S. 42 and the fact that explanation ii to S. 13 puts the duty of the plaintiff with reference to the question under consideration on the same footing as that of the defendant, extensive as that had been, as laid down in the *Sivaganga case* (11 M. I. A., 72), all these are strong indications to shew that the intention was to enlarge the scope of estoppel by record beyond the limits that would be admissible if the term "cause of action" were construed in its literal and most restricted sense which, in *Krishna Behari Roy* v. *Brojeswari*, the Judicial Committee said should not be done (L. R., 2 I. A., 283). In this state of the law, what matters might and ought to have been brought forward will depend upon the particular facts of each case. One test, as suggested by the Judicial Committee, is whether the matters are so dissimilar that their union might lead to confusion, I. L. R. 20 C. at p. 85. In the present instance, it is quite clear that such confusion could have arisen

Arunachalam Chetti v. Mevyappa Chetty.

had the want of sanction been brought forward along with fraud in the previous suit, nor has any other valid objection been suggested against the two grounds being then combined. It would follow, therefore, that the want of sanction in question might and ought to have been made a ground of attack in O. S. No. 48 of 1882, and should be taken to have been in issue in that suit as laid down in explanation ii to S. 13.

As regards the last argument of the Advocate-General, it would be quite permissible to reply that explanation ii in authorizing a fiction that the matter contemplated was in issue necessarily implies the further fiction that it was also adjudicated upon. But it is more satisfactory to say that the estoppel in question is different from that raised by an actual decision. In truth, the estoppel is that what might and ought to have been relied on in a former suit as a ground of attack or defence but was not, could not in subsequent litigations between the parties be brought forward for such purposes; and it is scarcely necessary to add that, notwithstanding the objections taken in some of the cases to the soundness of this doctrine, there is no doubt that it is founded on unquestionable grounds of expediency and public policy.

Before concluding, it is also well to point out that, assuming that the limited construction proposed by the Advocate-General were the correct one, even then the cause of action on which the suit of 1882 was based, must clearly be held to be identical with that in the present suit. For looking to the substance of the two actions, the dispute then was and now is as to the validity of the compromise embodied in the decree in suit No. 42 of 1879. No doubt the invalidity was sought to be established in the suit of 1882 on one ground while in this suit it is sought to be established on another ground. But these grounds are only different means invoked for making out what is manifestly a single and indivisible infringement of the self-same right.

In either view, therefore, the conclusion must be that the plaintiff is debarred from relying on the want of sanction in question.

It is, therefore, not necessary to discuss the question of limitation. But if it were, we should decide that the suit was instituted within three years from the time the plaintiff attained his majority.

The appeal fails and is dismissed with costs.

Davies, J.:—I concur throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard

Chinnathal. ... ... Appellant * (*Petitioner*).

v.

Viruthacha Pillai and others ... Respondents (*Counter-petitioners*).

Chinnathal *v.* Viruthacha Pillai.

Civil Procedure Code, S. 244—Order referring question as to who is the legal representative to a separate suit appealable—Hindu Law—Decree for partition, effect of, on survivorship.

When a question arises as to who is the legal representative of a party to a decree for purposes of execution, and the court executing the decree passes an order staying execution thereof and referring the claimants to a regular suit for the purpose of determining their respective claims to represent the deceased, such order falls under S. 244, C. P. C., and is, therefore, appealable.

Obiter dictum.—When a decree is passed in a partition suit, the plaintiff is from that date in point of law divided from the other co-parceners.

Appeal under Ss. 2, 244 and 584 of the Code of Civil Procedure from the order of the District Court of Tanjore in C. M. A., 91 of 1896, affirming the order of the Sub-Judge of Negapatam in execution petition 47 of 1896 in O. S., No. 12 of 1895.

K, a Hindu, brought a suit for partition of the family property and a *razeenamah* decree was passed in the suit. He died subsequent to the decree and three persons applied to the court to be put on the record as his legal representative. His wife claimed to succeed to his property as his heir; his uncle and his son claimed to represent him as surviving co-parceners and another son of his uncle claimed under a will alleged to have been executed by K. The Subordinate Judge thought that this was a fit case for staying execution and referring the parties to a regular suit to have their respective rights determined as provided by the last para. of S. 244, C. P. C., and passed orders accordingly. The widow then preferred an appeal to the District Court and the District Judge dismissed it saying, "There is no appeal. This is an order passed under S. 232, C. P. C., and not an order settling any matter between parties on the record under S. 244, C. P. C. The petition is dismissed with costs." Against this order the widow preferred this second appeal.

* C. M. S. A., No. 58 of 1897. 10th December 1897.

Chinnathal v. Viruthacha Pillai.

P. S. Sivaswami Aiyar for appellant.

C. Sankara Nair and *P. K. Subrahmania Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The District Judge is wrong in holding there is no appeal. Apparently he has overlooked the last para. of S. 244 P.*rima facie* the widow is entitled, there having been in point of law a partition between her husband and his co-parceners.

We must reverse the order of the District Judge and direct him to proceed according to law.

The appellant is entitled to costs of the appeal and the costs to be provided for in review order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Ismall Peer Ambalam ... ... Petitioner * (*Plaintiff*).

v.

Neelamegam Servai and another ... Counter-petitioners (*Defendants*).

Ismall Peer Ambalam v. Neelamegam Servai.

Civil Procedure Code, Ss. 17 cl. (c) and 20—Acquiescence to jurisdiction by non-resident defendant—Non-resident defendant must apply to stay proceedings.

Where a suit is instituted against two persons in a court within whose jurisdiction the cause of action has not arisen, but where one of the defendants resides, the non-resident defendant must, if he wishes the suit to be tried by any other court, apply under S. 20, C. P. C., to stay proceedings, otherwise, he will be deemed to have acquiesced in the institution of the suit in the court in which it is filed; it is not enough if he only objects to the jurisdiction in his written statement.

Viraragava v. *Krishnasami*, I. L. R., 6 M., 344, followed.

Civil revision petition against the decree of the Subordinate Court of Madura (East) in S. C. No. 120 of 1895.

The plaintiff sued to recover Rs. 234 due under a bond executed by the defendants at Rangoon on the 28th November 1891. The bond was payable on the 28th February 1892. The

* C. R. P., No. 691 of 1895. 13th December 1897.

suit was instituted in the Sub-Court of Madura (East) on the 10th February 1895. On that date, one of the executants of the bond was residing within the local limits of the jurisdiction of the Sub-Court, while the other was in Rangoon. Both the defendants contended that the suit was not maintainable without the special leave of the court under S. 17, cl. (c). They, however, did nothing further. The Sub-Judge dismissed the suit holding that he had no jurisdiction. The plaintiff then preferred this revision petition to the High Court under S. 25 of the Mofussil Small Cause Courts Act.

K. Narayana Rao for petitioner.

P. S. Sivaswami Aiyar for counter-petitioners.

The Court delivered the following

JUDGMENT :—The question raised in this petition is one that is not free from doubt. We think, however, that S. 17 (c), Civil Procedure Code, and the last paragraph of S. 20 must be read together and that the term "acquiesce" in S. 17 (c) must be interpreted in the light thrown upon it by S. 20. In this view it seems to us that the defendant who does not acquiesce under S. 17 (c) should indicate his want of acquiescence not by a mere objection to the jurisdiction of the court, but should apply under S. 20 for a stay of proceedings on the ground that it is more convenient that the suit should be tried in one or other of the courts in which it might have been instituted. The object of the procedure laid down in the two sections is to enable a decision to be arrived at, at the earliest possible opportunity, on the question in which of the several courts the suit can be more conveniently tried, having regard to the interests of all parties. If the plaintiff applies for leave under S. 17 (c) the court will at once determine the question. If the plaintiff does not do so, the law contemplates that the question may be raised by any non-resident defendant, who, however, must do so by showing that the trial can be more conveniently held by some other court. A bare objection to the jurisdiction is not, therefore, a compliance with the law, and, in the absence of such compliance, the defendant must be deemed to acquiesce in the institution of the suit in the court in which it is.

We have arrived at this conclusion on a construction of Ss. 17 and 20 of the C. P. C.; but we may observe that this construction

Ismall Peer Ambalam v. Neelamegam Servai.

appears to be in accordance with the decision in *Viraragava* v. *Krishnasami*, I. L. R., 6 M., 344. The reference in that case to S. 17 (*b*) seems to us to be a clerical error for S. 17 (*c*). If this view is correct, that case is a direct authority in support of this conclusion. In the present case, the 2nd defendant did not make an application under S. 20. He must, therefore, be deemed to have acquiesced in the institution of the suit at Madura. We, therefore, set aside the decree of the Sub-Judge and direct that the suit be restored to the file and be disposed of according to law.

Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar, C.I.E., and Mr. Justice Benson.

Jagapathy Mudaliar ... . Petitioner* (*Defendant*).

v.

Ekambara Mudaliar ... ... Respondent (*Plaintiff*).

Jagapathy Mudaliar v. Ekambara Mudaliar.

Vakils and other practitioners and their powers in the conduct of suits—Compromise, power to, of vakil—Express authority of client required to compromise.

A pleader engaged under an ordinary vakalatnama to conduct a suit has, in the absence of an express authority to that effect, no power to compromise the suit on behalf of his client.

Petition under S. 622 of the Civil Procedure Code, praying the High Court to revise the order of the Court of the District Munsif of Trivellore, on Petition, No. 1731 of 1896, in the matter of Small Cause Suit, No. 1088 of 1896.

A certain small cause suit on the file of the District Munsif's Court at Trivellore was compromised and a written instrument of compromise was put into Court signed by the plaintiff, his pleader and the defendant's pleader. The defendant was not in Court and it was not possible either to consult him or to get his signature to the compromise. Subsequently, however, the defendant appealed to the Court to set aside the compromise on the ground that the vakil had no right to do so without his express consent. The

* C. R. P. No. 99 of 1897. 15th December 1897.

Jagapathy Mudaliar v. Ekambara Mudaliar.

Munsif held that the vakil under his general powers to act in the suit had impliedly the power to compromise also. The defendant then preferred this revision petition to the High Court.

Champion and Biligiri for petitioner.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We are unable to accept the view taken by the District Munsif. In England no doubt, as urged for the plaintiff, an attorney, though he has not obtained express authority from his client for the purpose, has yet power to enter into a compromise on behalf of the latter. However, as pointed out in the note to S. 24 of Story on Agency (9th edition, page 27), such power has given rise to much litigation in England. It is not surprising, therefore, that even many of the American Courts administering the English Common Law have declined to follow the English rule referred to. It is true that in the note in Story, cited above, it is said that the American decisions on the point generally agree with those of the English Courts. But the accuracy of that observation has been questioned in *Levy* v. *Brown* where the Court says:—"In the elaborate note to S. 24 in Story on Agency and also in Wharton on Agency, section 592, it is said that the American rule is the same as the English. If these learned authors mean to say that a majority of the American courts recognize an inherent right in the attorney to compromise the original demand placed in his hand, so as to receive in full satisfaction less than the amount due, or to substitute claims upon other parties or to take property in satisfaction of a money demand or to release any security existing when he received the claim, we cannot agree with them. That there are cases going to this extent is true, but we think that the decided weight of authority in this country is the other way." (30 American Reports at p. 359). When such is the case in countries advanced as those American States are, it would scarcely be safe to apply the English rule to practitioners in the position occupied by the majority of vakils here. *Premsookh* v. *Prithee Ram* (2 N. W. P. H. C. R., Agra 222), *Mussat Hakemoonissa* v. *Buldes* (3 *Ib.* 309), *Mussamat Sirdar Begum* v. *Mussamat Izzatoot Nissa* (N. W. P. H. C. R. for 1870, p. 149), *Gour Pershad Doss* v. *Sookdeb Ram Deb* (12 S. W. R. C. R. 279), *Chunder Coomar Deo* v. *Mirza Sudakat Mahomed Khan*,

Jagapathy Mudaliar *v.* Ekambara Mudaliar.

(18 *Ib.* 436), and *Sheikh Abdul Sabhan Chowdury* v. *Shibkisto Daw* (3 B. L. R. appendix 15) are clear and distinct authorities against the view adopted by the District Munsif. Moreover, so far as this Presidency is concerned, it has been hitherto tacitly understood by all that a vakil has no implied authority to enter into a compromise on behalf of his client as is manifest from the practice of the courts which invariably insist upon the production of special authority from the client expressing consent to the compromise entered into on his behalf by the vakil before the compromise is accepted by the Court.

It is scarcely necessary to say that there is a considerable difference between the case where a pleader by way of compromise purports to give up a right claimed by the client or to saddle him with a liability that is not admitted, and the case on which stress was laid in the argument, *viz.*, where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interests. The power to bind by such admissions, which in effect is but dispensing with proof of the facts admitted, is one of the well recognized incidents of a pleader's general authority. To deny power so to bind the client or to do any similar act obviously necessary for the due conduct of litigation would so embarrass and thwart a pleader as in a great measure to destroy his usefulness. But no such undesirable results would follow from holding that in the absence of specific authority, a pleader cannot bind by compromises strictly such. It is true that the opinion of a pleader as to the advisability of a compromise is often valuable. But it must be conceded that a client ought to have the power of deciding for himself whether a right asserted should be relinquished and whether a liability denied should be accepted.

Having regard to all the considerations bearing on the matter, we think we ought to follow the Indian cases to which we have referred and hold that the compromise in the present instance entered into by the defendant's vakil without the defendant's authority and the decree passed thereon in spite of his opposition, are not binding on him. The decree is, therefore, set aside and the suit remanded for disposal according to law. Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, Mr. Justice Subrahmania Aiyar, Mr. Justice Davies, and Mr. Justice Benson.

Lakshminarayana Pantulu ... Appellant * (*Plaintiff*).

v.

Venkatrayanam and another ... Respondents (*Defendants*).

Lakshminarayana Pantulu *v.* Venkatrayanam.

Rent Recovery Act (Madras Act VIII of 1865), Ss. 3, 8, 9, 11—Mokhasadars not tenants—Mokhasadars not bound to accept pattah:

S. 3 of the Rent Recovery Act, and other sections therein which specially refer to it are intended to regulate the relation existing between tenants who are actual cultivators of the soil and their immediate landlords alone. Intermediate landlords, such as inamdars, mokhasadars, &c., who pay a permanently fixed quit-rent (*kattubadi, poruppu, jodi or* by whatever other name it might be known) and who are not actual cultivators of the soil are not bound to accept pattahs from and exchange muchilikas with the zemindars, their superior landlords.

Second appeal from the decree of the District Court of Kistna in Appeal Suit No. 2114 of 1893, reversing the decision of the Court of the Head Assistant Collector of Kistna in Summary Suit, No. 1694 of 1893.

The Plaintiff, Court of Wards for the minor zemindar of Telaprole estate, sued to compel the defendants who were mokhasadars on the estate to enforce them to accept pattahs and exchange muchilikas for fasli 1302. The Head Assistant Collector, following *Suryanarayana* v. *Appa Rau*, I. L. R., 16 M., 40, decreed the plaintiff's suit. On appeal the District Judge of Kistna held that the defendants who were mokhasadars were not tenants who were bound to accept pattahs within the meaning of the Rent Recovery Act and so dismissed the plaintiff's suit. The plaintiff then preferred this second appeal to the High Court.

C. R. Pattabhirama Aiyar for appellant.

N. Subrahmanyam, C. Ramachandra Rao Saheb and *R. Sriramulu Sastri* for respondent.

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* S. A. No. 939 of 1895. 15th December 1897.

Lakshmi-narayana Pantulu *v.* Venkat-rayanam.

This second appeal coming on for hearing on Thursday, the 8th July 1897, before the Division Bench (consisting of the *Chief Justice* and *Mr. Justice Shephard*) the Court made the following

ORDER OF REFERENCE TO FULL BENCH:—We refer to the Full Bench the following question, viz.:—

Whether the defendants not being (as is assumed) cultivating tenants, are bound to accept a pattah from the zemindar. (See *Suryanarayana* v. *Appa Rau*, I. L. R., 16 M., 40, and cases cited).

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar, J.*—The plaintiff is a Zemindar and is, therefore, undoubtedly a landholder mentioned in S. 3 of the Rent Recovery Act (VIII of 1865). The defendants own a village in the plaintiff's zemindari as *mokhasa-inamdars* and as such they have to pay *kattubadi* or fixed money rent annually to the plaintiff.

The learned counsel for the defendants urged that they being *inamdars*, ought not to be held to be, within the meaning of the Rent Recovery Act, tenants in any sense.

This contention is, however, opposed to the course of decisions since 1883. In *Appasami* v. *Rama Subba*, I. L. R., 7 M., 262, it was held that an *inamdar* who paid quit-rent to a superior *inamdar* was in respect of that quit-rent liable at the instance of the superior *inamdar* to be summarily proceeded against under the Act as a tenant. In *Subbaraya* v. *Srinivasa* (*Ib.* 580) it was ruled that a permanent lessee of a village forming part of a mittah—though he was not an agricultural tenant—was nevertheless a tenant within the meaning of S. 12 of the Act and, therefore, entitled to institute a summary suit for damages sustained in consequence of his having been unlawfully ejected by the *muttadar*. In *Bhaskarasami* v. *Sivaswami* (I. L. R., 8 M., 196) the decision was that a zemindar could under the Act cause the interest of a permanent lessee (whose holding was similar in character to that of the lessee in the last case)—to be sold for arrears of rent due under the lease. And lastly in *Suryanarayana* v. *Appa Rau* (I. L. R., 16 M., 40) the Court upheld the contention that a zemindar could under the Act distrain for arrears of *jodi* payable by *inamdars*.

Lakshminarayana Pantulu v. Venkatrayanam.

So far as I am aware, no doubt has hitherto been thrown upon the view of the law adopted in the above decisions and I believe that a considerable number of titles has been created under sales held upon the strength of that view of the law. In these circumstances it is I think too late to contend that the defendants are not tenants at all within the meaning of the Act.

Moreover, the present order of reference, as I understand it, assumes that the defendants are tenants under the Act for some purposes and only raises the question whether they are tenants falling within S. 3 of the Act and the other sections relating to the exchange of pattas and muchilikas.

Now the language of the leading section, viz., 3, clearly points to tenants who are directly connected with land as cultivators. Unquestionably these are the persons who are sometimes spoken of as cultivating or agricultural tenants but more generally as ryots. It is this well known and very numerous body of people that the Legislature has all along taken special precautions to protect, for the simple reason that while the agricultural prosperity of the country so much depends on their well-being, they are peculiarly liable to be oppressed by zemindars or other landholders who have the right to collect rents from them. One of the measures adopted very early for ensuring the desired protection to ryots was the compulsory exchange of pattahs and muchilikas. In the earliest Regulation relating to the subject, XXX of 1802, the following passage occurs in the preamble "to the end that cultivators and under-tenants of land may have the benefit and protection of determinate agreements in their dealings with superior landholders and farmers of land, and it being necessary to the security and comfort of cultivators and under-tenants that the terms of such agreements should be made specific to the end that cultivators and under-tenants being sensible of the advantage of such security may have recourse to them for the prevention of disputes; wherefore the following rules have been enacted for the execution of pattahs between proprietors or farmers of land, or amils, and under-tenants under farmers, or ryots." And the opening words of the first section of the said Regulation are "Proprietors and farmers of land shall enter into agreements with the inhabitants and cultivators of land on the terms on which they respectively occupy such land."

Lakshmi-narayana Pantulu v. Venkat-rayanam.

And though when the law as to the recovery of rent was consolidated and amended in 1865, the cultivators or ryots were less liable to be subjected to exactions on the part of the zemindars than they had been in 1802, yet the needful continuance of the protection secured by the compulsory exchange of engagements had not materially diminished. Consequently the substance of the old law on the point was re-enacted with the important and stringent modification contained in S. 7 of Act VIII to the effect that the pattah tendered should be such as the tenant was bound to accept. It is scarcely necessary to add that certain circumstances connected with holdings of ryots render periodical adjustment of accounts between them and the zemindar necessary, and the annual exchange of engagements in their case is, therefore, of great practical importance.

Now before proceeding to consider whether the provisions in the present law relating to pattahs and muchilikas extend also to the case of *inamdars* such as the defendants, I should make a few observations with reference to the assumption made in section 3 that in the case of tenants mentioned therein there was an existing relation of landlord and tenant which would warrant the application by either party for a written agreement, inasmuch as the learned vakil for the plaintiff, if I understand him correctly, seemed to suggest that that assumption was scarcely true of cultivators or ryots above referred to. But that the assumption in question has all along been true in respect of the holdings of ryots generally admits of no doubt as will be seen from Second Appeal No. 766 of 1896 where the true origin and character of holdings of ryots were recently considered. The authorities cited there that ryots are neither tenants-at-will nor tenants from year to year but possess in the lands under their occupation a far more lasting interest and in fact they are peasant proprietors being entitled to what is known as the *kudivaram* right as opposed to the *melvaram* right or the right of the State. That such was the view adopted by the framers of the Rent Recovery Act is clear from the final report, dated the 21st December 1864, submitted by the Select Committee on the Bill which became the Rent Recovery Act. After referring to the Proceedings of the Board of Revenue, dated the 2nd idem, in which the entire history of the relation between zemindars and ryots was reviewed, the

Committee in paragraphs 4 and 5 of their report observe "without going so far as to hold that zemindars are only farmers or assignees of the public revenue and not proprietors of their estates, they (the Committee) unanimously concur with the Board (of Revenue) that the Regulations of 1802 were intended to protect the rights of occupants of land under zemindars by fixing the maximum rent demandable from them and forbidding their ejectment as long as that rent was paid. The Committee further hold that Regulations IV and V of 1822 were passed for the increased protection of such occupants of land, in consequence of the passages in the Regulation of 1802 which spoke of a proprietary right being conferred on zemindars having led to doubt and misapprehension. No alteration is, therefore, necessary in the *principle* of this Bill which was framed on the above view of the rights of occupants of land under zemindars." * * (5 Madras Revenue Register at pages 116 and 117).

The above extract furnishes the clue to the assumption which is made in section 3 and on which stress was laid on behalf of the plaintiff as if it somehow detracted from the view that section 3 referred only to tenants in the position of ryots and in my opinion that assumption is perhaps the strongest argument in favour of that view. For the assumption is not true in respect of any other description of tenants of zemindari lands.

Turning now to the case of *inamdars* in the position of the defendants, it is obvious that they do not strictly come within either the strict letter or the spirit of the provisions in question. In the first place the *inamdars* are, it is conceded, not occupants of land but possess only the right to receive rents due by such occupants. Secondly, the *inamdars* form a comparatively very small class fairly able to look after their own interests in their relation with zemindars or other superior landholders. Thirdly and lastly, the amount of quit-rent or (*kattubadi, jodi, poruppu* or by whatever other name it might be known) payable by them to zemindars or others under grants creating the inams being mostly fixed permanently, there is little or no necessity for periodical revision and settlement such as are required between zemindars and ryots. Consequently, exchange of pattahs and muchilikas between zemindars and *inamdars* cannot serve any really useful end.

Lakshminarayana Pantulu v. Venkatrayanam.

On the contrary though the exchange of such documents between those persons would in truth be nothing more than an idle formality, yet the neglect of it would so far as zemindars are concerned lead to the serious consequence of loss of rent.

For these reasons, I think that the provisions contained in section 3 and the sections which specially refer to it were not intended to apply to *inamdars* in the position of the defendants.

It remains only to observe that even if a different construction were possible, this Court would be precluded from adopting such a construction by the decision of the Privy Council in *Ramasami* v. *Bhaskarasami* (I. L. R., 2 M., 67). There it was held that a lease of a village granted by a zemindar to a banker was not a pattah within the meaning of the Rent Recovery Act. In the course of their judgment their Lordships observe "section 3 seems to be confined to the relation of tenants who are cultivating the land and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be by section 3 and the sections which specially refer to it to regulate the relation of landlords and tenants of that description" (at page 72). These observations were not *obiter dicta,* but were necessary for the decision of the case [see also *Rama* v. *Venkatachalam,* I. L. R., 8 M., 577].

I would, therefore, answer the question submitted in the negative.

The Chief Justice.—I agree.

Davies, J.—I concur throughout.

Benson, J.—I also concur.

[The appeal was dismissed with costs.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Manickam ... ... Appellant * (*Petitioner*).

v.

Tatayya and others ... ... Respondents (*Counter-Petitioners*).

Manickam v. Tatayya.

Civil Procedure Code, Ss. 232, 244—Transferee decree-holder's right to execute—Benami transferee—Contest between benami transferee and real transferee as to the right to execute decree.

* C. M. S. A. No. 26 of 1897. 13*th* January 1898.

Where a question arises in execution proceedings as to who is the real transferee of a decree, the Court may under S. 244, C. P. C., either decide the question then and there, or refer the parties to a separate suit for a decision thereon.

Notwithstanding the form of the transfer, the real transferee of a decree may apply to execute it under S. 232, C. P. C.

Once an executing Court, in the exercise of its discretion, decides upon allowing the transferee to execute a decree, it has no further discretion to choose as between the benamidar and the real transferee of the decree. The real transferee must be put on the record in preference to the benamidar. The mere fact that the benami transferee had been allowed to execute a decree under S. 232, C. P. C., does not debar the real transferee from applying afterwards under the same section to be allowed to carry out the further execution of the decree.

Appeal from the District Court of Godaveri in A. S. No. 331 of 1895, presented against the decision of the Court of the District Munsif of Ellore in Execution Petition, No. 369 of 1895, in the matter of O. S. No. 242 of 1892.

The facts of the case appear sufficiently from the judgment of *Mr. Justice Subrahmania Aiyar.*

V. Krishnaswami Aiyar and *R. Kuppusami Aiyar* for appellant.

P. S. Sivaswami Aiyar for 6th respondent and *S. Gopalasami Aiyangar* for the 7th respondent.

The Court delivered the following

JUDGMENTS :—*Subrahmania Aiyar, J.*—One Lakimsetti Subrayudu obtained a decree for money in original suit, No. 242 of 1892. Shortly after, one Potti Subrayudu (deceased), alleging himself to be the transferee of the decree, applied to be permitted to execute the decree, and he was allowed by the Court to do so. The appellant, Manda Manickam, alleging that he and his brother, the 5th respondent, are the real transferees and that Potti Subrayudu was but a benamidar for them, has now applied to execute the decree. As I understand the order of the District Judge, he holds that even if the appellant is one of the real transferees, S. 232, Civil Procedure Code, does not admit of such transferee applying under the section, and further, supposing that an application for the execution of the decree by such transferee is entertainable under the section, the Courts should, in the exercise of their discretion, decline to grant the application. But it is impossible to

Manickam v. Tatayya.

doubt that, notwithstanding the form of the transaction, it is the person beneficially entitled under the transaction that is the transferee of the decree. The right of such transferee to apply under S. 232 has been admitted: *Abdul Kureem* v. *Chukhun* (5 C. L. R. 253); *Balkishen Das* v. *Bedmati Koer* (I. L. R., 20 C. 388); C. M. S. A. No. 27 of 1894; S. A. No. 1393 of 1896.

It is true that in the present instance the alleged nominal transferee applied and was allowed to execute the decree on the footing that he was the real transferee. The proceedings taken by him in execution though binding upon the real transferee so far as they go, could not estop the latter from claiming to conduct the further execution of the decree himself. And so far as this point is concerned the fact that the real transferee comes forward to execute the decree after the nominal transferee has been allowed to execute, is of no consequence. Nor does the circumstance that the alleged nominal transferee denies that he is a nominal transferee affect the right of a person claiming to be the real transferee to have the point tried. Under the law as it now stands it may be tried in the execution proceedings or in a separate suit according as the Court considers the one or the other the more convenient course to be adopted in the particular case. It is scarcely necessary to point out that when there is a contest the question whether the party claiming to be the real transferee is or is not such, is a question as to whether he is a representative of the party to the suit in whose favour the decree was given and, therefore, falls under the last paragraph of S. 244 of the Civil Procedure Code: *Badri Narain* v. *Jai Kishen Das* (I. L. R., 16 A., 483), *Gour Mohan* v. *Golui* and *Madhub Chandra Samanta* v. *Deo Nath Karamkar* (2 C. Weekly Notes, page 76). The District Judge was, therefore, wrong in my view in holding that the appellant was not entitled to apply under S. 232 of the Code. He was also wrong in considering that, even if the application was entertainable under the section, because the transfer was benami, the Court should therefore refuse to allow the real transferee to execute it. I would, therefore, call upon the District Judge to submit a finding upon the question whether Potti Subrayadu was the real transferee or the appellant and his brother are the real transferees. The finding will be upon the evidence on record, unless the Judge is satisfied that the appellant had not sufficient opportunity of adducing evidence on

the point as alleged by him. If the Judge is so satisfied fresh evidence may be received. The finding is to be submitted within one month from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in the Court.

Manickam v. Tatayya

Shephard, J.—I reserved judgment in the case only because some doubt was entertained as to whether the claim of the appellant could legally be dealt with on a petition. I agree with my learned colleague in holding that the appellant may apply under S. 232 of the Civil Procedure Code and also in the proposed order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Periatambi Odayan ... ... Petitioner* (*1st Defendant*).

v.

Vellaya Kavundun and another ... Counter-Petitioners (*Plaintiffs*).

Periatambi Odayan v. Vellaya Kavundun.

Civil Procedure Code, S. 258—Payment out of court—Remedy of judgment-debtor —Separate suit not barred.

A decree was satisfied out of court by payment. The decree-holder failed to certify the payment to the court as required by S. 258, C. P. C., and the judgment-debtor too failed to apply to the court within the time limited. The decree-holder then applied to execute the decree; and the court allowed him to realise the decree amount in execution overruling the objections of the judgment-debtor as made beyond time. The judgment-debtor then filed a suit for damages against the judgment-creditor for not certifying the payment to the court.

Held: that the suit was maintainable and that neither S. 244 nor S. 258 was a bar to it.

Guruvayya v. Vudayappa, I. L. R., 18 M., 26; *Rama Ayyan* v. *Sreenivasa Pattar, Ib.* 19 M., 230, distinguished.

Civil revision petition against the decree and judgment of the Subordinate Court of Bellary and Salem at Salem in Small Cause Suit No. 39 of 1896.

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* C. R. P. No. 126 of 1897. 15th December 1897.

Vide *Subbakka* v. *Viraraghava Reddi,* I. L. R., 5 M., 397; *Mallamma* v. *Venkappa, Ib,* 8 M. 277; *Arunachella Pillai* v. *Appavu Pillai,* 3 M. H. C., 188 [Rep. note.]

Periatambi Odayan v. Vellaya Kavundun.

This was a suit for Rs. 200 with interest Rs. 72 as damages. 1st and 2nd plaintiffs, and 3rd and 4th defendents, with others were judgment-debtors in O. S., No. 401 of 1890, on the file of the Salem District Munsif, first defendant being the judgment-creditor. In execution, the moveable property of the plaintiffs and 3rd and 4th defendants was attached on 26th October 1893. In the course of mediation then made, 1st defendant agreed to receive Rs. 200 in quit of the decree demand, if paid within one month, and remit the excess. Accordingly in November 1893, plaintiffs paid Rs. 200 to 1st defendant through 2nd defendant who is moniyagar and whom they (plaintiffs) took along with them and obtained receipt from the 1st defendant. The receipt was left with 2nd defendant, 1st defendant having promised to enter up satisfaction of decree in court and get an order for release of the attached property. 1st defendant, without certifying satisfaction, fraudulently applied for execution in execution petition 451 of 1896, in July 1896, and the plaintiff's objection was disallowed as made beyond time.

The plaintiffs then filed this suit to recover the sum paid by them with interest. The Sub-Judge decreed the suit against the 1st defendant who thereupon preferred this revision petition to the High Court.

T. V. Seshagiri Aiyar for petitioner.

R. Shadagopachariar for counter-petitioner.

The Court made the following

ORDER:—The finding is that the money was paid in full discharge of the judgment-debt, the 1st defendant undertaking to enter up satisfaction. No satisfaction was entered up, and no application to compel him to do so was made by plaintiff within 90 days of the payment. It was, therefore, not competent to the executing court to determine whether the payments had been made or not. The only course open to the plaintiff was that which he followed, viz., to bring a suit for the amount. The fact that no application was made within 60 days, distinguishes the present case from *Guruvayya* v. *Vudayappa*, I. L. R., 18 M., 26; as the court then held that it was open to the plaintiff to seek relief in execution, it must be taken that the application was made within 60 days, though the

report does not expressly state this. In *Ramayyan* v. *Srinivasa Pattar*, *Ib.* 19 M., 230, the person relying on the adjustment was not entitled to make an application under S. 258, C. P. C., within 60 days from the date of the adjustment as against the person who denied the adjustment, inasmuch as the latter was not then an assignee. That decision cannot be taken to justify an enquiry into an alleged adjustment after the expiry of 90 days from the time when a party relying on the adjustment had become entitled to apply that adjustment should be recorded.

Periatambi Odayan v. Vellaya Kavundun.

We must, therefore, dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Rangachariar ... ... Appellant * (*1st Respondent*).

v.

Balaramasami Chetti and others ... Respondents (*Appellant* and *2nd Respondent*).

Rangachariar v. Balaramasami Chetti.

Limitation Act, Sch. ii, Art. 179, (cl.) 4.—Application for attachment list—Step in aid of execution.

An application by a decree-holder for a copy of the list of properties attached in previous execution proceedings is not an application to take a step in aid of execution within the meaning of cl. (4), Art. 179, Sch. ii of the Limitation Act. *Kunhi* v. *Seshagiri*, I. L. R., 5 Mad., 141, referred to.

Appeal under Ss. 2, 244 and 584, C. P. C., from the decree of the District Judge of Chingleput in A. S. No. 523 of 1896, reversing the decree of the District Munsif of Poonamalee in Execution Petition No. 720 of 1896, in O. S. No. 472 of 1892.

An application to execute a decree was made on the 21st June 1892. The decree-holder subsequently died, and on the 25th January 1895, his representatives applied for a copy of the attachment list. On 14th August 1896, they again applied to execute the decree by sale of the properties already attached. The District Munsif dismissed this application as barred by limitation. On appeal the District Judge held that the application made on the 25th January 1895 for a copy of the attachment list was a step in aid of

* C. M. S. A. No. 59 of 1897. 10th December 1897.

Rangachariar v. Balaramasami Chetti.

execution and so reversed the order of the District Munsif. He said:—

"The case nearest to the present one is *Kunhi* v. *Seshagiri*, I. L. R., 5 M., 141. There the decree-holder applied for a copy of a diary order, certifying that a copy of the Revenue Register was necessary, with a view of producing the copy of the order before the Revenue authorities and so getting his copy of the Revenue Register more promptly and without objection. It is admitted that this application was not strictly necessary, but it was regarded as a step in aid, because it tended to secure more prompt disposal of the execution case. In the present case, the original decree-holder had died after attaching the judgment-debtor's land, and his representatives in taking up the case had not the original paper and found it necessary to obtain a copy of the attachment order before they could draw up the application for sale under S. 287 of the Code in the form required by the High Court rules."

The judgment-debtor then preferred this appeal to the High Court against the decision of the District Judge.

K. Krishnamachariar for appellant.

P. M. Sivagnana Mudaliar for respondents.

The Court delivered the following

JUDGMENT:—We think this case is clearly distinguishable from *Kunhi* v. *Seshagiri*, I. L. R., 5 M., 141. We cannot see how an application for a list of attached property can be said to be an application to take a step in aid of execution.

The appeal is allowed, and the District Munsif's order restored with all costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Srinivasa Aiyangar ... ... Appellant* (*6th Defendant*).

v.

Aiyathorai Pillai ... ... Respondent (*Plaintiff*).

Srinivasa Aiyangar v. Aiyathorai Pillai.

Appeal Civil Procedure Code, Ss. 2, 244 and 310 (A)—Mortgagee person whose immovable property has been sold.

A and B who were joint owners of some property together mortgaged it to C. C. then sued on the mortgage and got a decree against them both. After decree A

* C. M. S. A., No. 41 of 1897. 9th December 1897.

Srinivasa Aiyangar v. Aiyathorai Pillai.

sold away his share of the property to B in consideration of the latter undertaking to pay the whole of the decree amount and executing to him a simple mortgage on the share so sold for the balance of the sale amount. Subsequent to this arangement, C executed his decree and purchased the entire property himself in execution. B then applied to the court to have the sale set aside under S. 310 (A), C. P. C.

Held: that as B's mortgage would be affected by the sale, he was a person whose immovable property had been sold within the meaning of S. 310 (A), C. P. C., and that, consequently, he was entitled to the benefit of that section, and that as the purchaser was the decree holder himself and the matter was one arising in execution, the order passed between him and another party to the suit under S. 310 (A) was appealable.

Rakkal Chunder Bose v. *Dwarka Nath Misser* from I. L. R., 13 C., 346, referred to.

Appeal from the order of the District Court of Tanjore, dated 14th August 1896, in C. M. A., No. 33 of 1896, presented against the order of the District Munsif's Court at Tiruturaipundi in C. M. P., No. 393 of 1896, in the matter of O. S. No. 157 of 1890.

In execution of a mortgage decree passed in O. S. 157 of 1890, on the file of the District Munsif's Court of Tiruturaipundi the mortgaged property was sold in execution and purchased by the decree-holder on 5th of February 1896. The 5th and the 6th defendants in the suit were the mortgagors and owners of the property and were liable to pay the decree amount in equal shares. After the passing of the decree in the said suit and before the sale, the 6th defendant transferred his half share in the property to the 5th, and in consideration thereof the 5th defendant undertook to pay the entire decree amount and executed a simple mortgage of the half share sold to him for the balance of the purchase money. Subsequently, he colluded with the decree-holder and the latter executed his decree and in execution sold the mortgage property and himself purchased it. The 6th defendant then applied on the 5th March 1896, under S. 310-A, C. P. C., to set aside the sale with this prayer in his petition: "I am prepared to pay the amount due under the decree; I, therefore, request the Court to receive the decree amount from me and to set aside the sale under S. 310-A, C. P. C." Both the District Munsif and the District Judge held that he was not entitled to do so as he had sold away his share. He then preferred this appeal to the High Court.

S. Gopalasami Aiyangar for appellant.

V. Krishnaswami Aiyar for respondent.

Srinivasa Aiyangar v. Aiyathorai Pillai.

The Court delivered the following

JUDGMENT :—We cannot accept the respondent's contention that no appeal lies in this case. The respondent before us, who is the purchaser, is the decree-holder. The question is one which arises in execution between him and the appellant before us who is also a party to the suit. The order, therefore, must be treated as one falling under S. 244, Code of Civil Procedure, and, therefore, appealable.

It is next objected that the appellant before us being only a mortgagee is not entitled to the benefit of S. 310-A, Code of Civil Procedure. On the analogy of the decision in *Rakhal Chunder Bose* v. *Dwarka Nath Misser*, I. L. R., 13 C., 346, we think that the appellant is an "owner of immovable property" within the meaning of S. 310-A, and as his mortgage was subject to the right of the respondent under the mortgage-decree in execution of which the sale took place, he would be affected by the sale, and should, therefore, be held entitled to ask for cancellation of the sale on making the payments prescribed by that section : *Asmutunnissa Begam* v. *Ashruff Ali* (*Cf.* I. L. R., 15 C. 488 at pp. 491 and 492).

We must, therefore, set aside the orders of the lower Courts and direct the petition to be restored to the file of the District Munsif and the appellant must be allowed to pay into court the sum payable under S. 310-A, within a time to be fixed by the District Munsif, and of which reasonable notice is to be given to both parties. If the payment is made within the time fixed, the sale should be set aside. In default, the petition will stand dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Venkata Krishnayya ... ... Appellant * (*Defendant*).

v.

Narasimham ... ... Respondent (*Plaintiff*).

Venkata Krishnayya v Narasimham.

Civil Procedure Code, Ss. 310 (A) and 311—Withdrawal of application under S. 311—Compliance with S. 310 (A).

A judgment-debtor whose immovable property had been sold in execution applied under S. 311, C. P. C., to set aside the sale. Immediately after and within

* C. M. S. A. No. 47 of 1897. 9th December 1897.

the 30 days allowed by law, he applied also under 310 (A) depositing the amounts referred to in cl. (*a*) and (*b*) of that section. When the petitions were first called on for hearing, he withdrew the former and elected to proceed with the latter.

Venkata Krishnayya *v.* Narasimham

Held: that he was entitled to do so as, under the circumstances, the matter must be treated as if no application had been made under S. 311, C. P. C.

Appeal from the order of the District Court of Godaveri in A. S., No. 7 of 1896, reversing the order of the District Munsif of Narasapur in M. P. No. 468 of 1896.

In execution of the decree in O. S., No. 174 of 1894, on the file of District Munsif of Narasapur, some immovable property belonging to the judgment-debtor was sold on 22nd of January 1896, and purchased by the decree-holder. On the 17th February 1896, the judgment-debtor applied under S. 311, C. P. C., for setting aside the sale on the ground of material irregularities in the conduct of the sale. While that petition was pending, he presented another application under S. 310 (A) on the 20th February 1896, depositing the amounts referred to in clauses (*a*) and (*b*) of that section. Objection was taken by the decree-holder under the proviso to S. 310 (A) that both the petitions could not be permitted and the judgment-debtor in consequence withdrew his petition under S. 311, C. P. C., on the 25th March 1896. The petition under S. 310 (A) came on for hearing after this, and the District Munsif held that the withdrawal of the petition under S. 311 substantially satisfied the spirit of the proviso to S. 310 (A) and set aside the sale. On appeal, however, the District Judge reversed the Munsif's decision. The judgment-debtor then preferred this appeal to the High Court.

C. Ramachandra Rao Saheb and *N. Subba Rao* for appellant.

Stephen Andy for respondent.

The Court delivered the following

JUDGMENT:—The District Judge has made a mistake of fact in stating that the application under S. 310-A, Civil Procedure Code, was not made within 30 days of the sale. It was made on the 20th February, and not on the 22nd as erroneously supposed by the District Judge, and was, therefore, within 30 days of the sale which was on the 22nd January.

The District Judge has also, we think, erred in holding that the District Munsif had no power to entertain the application

Venkata Krishnayya v. Narasimham.

under S. 310-A. Although a petition under S. 311, C. P. C., was pending when that under S. 310-A was put in, yet when the petitions were first called up for disposal, the petitioner was, at the instance of the other side, called upon to elect whether he will proceed with the petition under S. 310-A, or with that under S. 311, and he then withdrew the latter.

In these circumstances, we must treat the matter as if no application under S. 311 has been made. The policy of the section is to prevent a person who determines to impeach the sale under S. 311 from at the same time obtaining the benefit of the concession granted under S. 310-A.

We do not think that it was intended that a party who withdraws all objections under S. 311 (without having done more than merely file a petition under the section) should be debarred from claiming relief under S. 310-A.

We must, therefore, set aside the order of the District Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Sankaralinga Mudali ... Appellant* (*Plaintiff*).

v.

Rathnasabapathi Mudali and another. Respondents (*Counter-petitioner and his representative*).

Sankaralinga Mudali v. Rathnasabapathi Mudali.

Civil Procedure Code, Ss. 80, 101, 108, 588—*Ex parte* decree, effect of setting aside—Summons, serving of—Summons, when affixable to the outer door.

After he was declared *ex parte*, the defendant in a suit applied under S. 101, Civil Procedure Code, to be heard in answer to the suit. The application was rejected and a decree *ex parte* was passed against him. He then applied under S. 108, C. P. C., to set aside the *ex parte* decree, and this was also refused. Against this latter order, he preferred an appeal under S. 588, C. P. C.

*C. M. A. No. 6 of 1897. 16th December 1897.

Sankaralinga Mudali v. Rathnasabapathi Mudali.

Held: that notwithstanding the dismissal of his application under S. 101, C. P. C., the defendant was entitled to apply under S. 108, C. P. C., to set aside the *ex parte* decree; and

that the effect of setting aside the *ex parte* decree under S. 108, C. P. C., was to nullify the order that had been passed under S. 101, C. P. C., so as to allow the defendant to appear and defend the suit.

If in the course of serving a summons to the defendant in a suit, the serving officer receives information that leads him to think that the defendant is only temporarily absent, he must wait and effect a personal service. But if it be otherwise and if there be no person who can be served in the absence of the defendant, there is nothing improper in the officer's affixing a copy of the summons to the outer door of the defendant's residence.

Bhomshetti v. *Umabai*, I. L. R., 21 B. 223, referred to.

Appeal from the order of the District Court of North Arcot on M. P., No. 120 of 1895.

In O. S. No. 42 of 1892, on the file of the District Court of North Arcot, the defendants who were found to have been duly served were declared *ex parte*. After this order the defendants appeared and applied under S. 101, to have the order set aside on the ground that they had been temporarily absent at Ranipet and that the summons had not been duly served on them. The application was rejected and a decree *ex parte* was passed against them. They then applied under S. 108, C. P. C., to set aside the *ex parte* decree. The District Judge after enquiry held that there was a proper service on them and that they had not sufficient cause for not appearing on the day fixed for hearing and rejected the application. The defendants then preferred this appeal under S. 588, C. P. C.

V. Krishnaswami Aiyar for appellant.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *S. Gopalasami Aiyangar* for respondent.

The Court delivered the following

JUDGMENT :—The Advocate-General raises a preliminary objection to the effect that inasmuch as an order was passed against the 2nd defendant (appellant) under S. 101, Civil Procedure Code, and as no appeal was made against the *ex parte* decree so as to enable the appellant to impeach that order, the appellant

Sankaralinga Mudali v. Rathnasabapathi Mudali.

was not entitled to make an application under S. 108, raising the same question as had been already decided against him under S. 101, nor should he be now allowed to appeal against the order made against him under S. 108.

This contention, at first sight, may seem to be reasonable, but having regard to the very wide words "in any case" used in S. 108, we are unable to hold that the defendant was not entitled to make an application under S. 108. That being so, he was under S. 588 entitled to prefer the present appeal. Nor can we agree with the Advocate-General's contention that even if an appeal lie and the *ex parte*-decree is set aside, the proceedings will be futile, inasmuch as the order passed under S. 101 could not be interfered with in an appeal like the present. We think that, if under S. 108 an *ex parte* decree is set aside, this necessarily carries with it a reversal of any order previously made under S. 101 refusing to allow the party to appear and defend the suit. To hold otherwise would lead to an absurdity.

Turning now to the merits, the question whether the serving officer "cannot find" the defendant within the meaning of S. 80, is one which must be determined with reference to the circumstances of each case. If the information given to the serving officer leads him to think that the defendant is only to be absent for a short time, it may well be that the serving officer should, if possible, wait and endeavour to effect personal service, *Bhomshetti v. Umabai*, I. L. R., 21 B., 223. Otherwise, and if there is no person who can be served in the absence of the defendant, we see nothing improper in the serving officer affixing the summons to the outer-door of the defendant's ordinary residence. In the present case, the serving officer's return shows that, according to the information given to him, there was no prospect of his being able to serve the appellant personally within a reasonable time. He was, therefore, justified in affixing the summons to the door of the house, and the District Judge was justified in accepting it as a sufficient service.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam.

Chidambara Nadar and another ... Petitioners* (*Defendants*)

v.

Srinivasa Aiyangar ... Respondent (*Plaintiff.*)

Specific performance—Separate suits for damages—Deposit, return of—Civil Procedure Code, Ss. 13, 43—Limitation.

Chidambara Nadar *v.* Srinivasa Aiyangar.

The plaintiff entered into a contract for the purchase of lands from the defendants and made a deposit, of Rs. 165, with them as part of the price consideration for the sale. Subsequently, the defendants refused to perform the contract; and the plaintiff brought a suit for specific performance in which, however, he failed. He now sued more than three years from the date of the former suit for the return of the deposit.

Held: that the plaintiff ought to have sought for this relief in the previous suit for specific performance and that the present suit was barred (by S. 43, Civil Procedure Code); and

that time began to run against the plaintiff for the recovery of the deposit from the time when he first sought to enforce his right by bringing his action for specific performance and that the present suit was barred by limitation.

Civil revision petition from the decree of the District Court of Trichinopoly in S. C. No. 22 of 1897.

The plaintiff sued to recover Rs. 165 paid to defendants as part price of land agreed to be purchased by the former. The defendants refused to perform their part of the contract, and the plaintiff consequently sued them for specific performance, but failed in the suit. He now sued for the recovery of his deposit money. The defendants contended that the suit was barred under S. 43, Civil Procedure Code, and that the cause of action for the plaintiff arose when he sued for specific performance more than three years previous to the present suit, and that, consequently, the suit was barred by limitation. The District Judge ruled against the defendants on both the points and decreed the plaintiff's suit. On the question of limitation he said :—

"Nor is the suit barred by limitation. The Article to be applied is, I think, Art. 97 of the second schedule, and the consideration failed when the Court finally refused to enforce the specific performance. The final refusal was by the High Court on appeal on 5th March, 1896.

* C. R. P. No. 357 of 1897. 24th February 1898.

Chidambara Nadar v. Srinivasa Aiyangar.

(A. S. 29 of 1895) and from that date, I think limitation runs (*Bassu Kuar* v. *Dhum Singh*, I. L. R., 11 A., 47)."

The defendants then preferred this revision petition to the High Court.

V. Krishnaswami Aiyar for *P. R. Sundara Aiyar* for petitioners.

P. S. Sivaswami Aiyar and *V. R. Ponnusami Aiyangar* for respondent.

The Court delivered the following

JUDGMENT:—The District Judge is wrong. The plaintiff's present claim for repayment of the deposit money forms part of the damages he might and should have claimed alternatively in his action for specific performance. Even if this were not so, the plaintiff's action is barred; for the statute begins to run from the time when the plaintiff first sought to enforce his right by bringing his action for specific performance. The money was then repayable at once if the plaintiff was not entitled to a decree for specific performance, and in that very action he could have recovered it. The general rule is that every suit speaks from the date of plaint and not from the date of the decree though there may be cases (of which this certainly is not one) in which limitation may begin to run from the date of the decree and not the plaint (*Bassu Kuar* v. *Dhum Singh*, I. L. R., 11 A., 47). The decree of the District Judge is reversed and the plaintiff's suit is dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Kanaran and another ... ... Appellants * (*Respondents*)

v.

Kuttooly and another ... ... Respondents (*Defendants*).

Kanaran v. Kuttooly.

Mortgagor and Mortgagee—Equity of redemption, fetter on, invalidity of—Contract to sell mortgaged property in case of failure to redeem.

A contract between the mortgagor and mortgagee of immoveable property, entered into at the time of the execution of the mortgage, to the effect that the

* S. A. No. 38 of 1897. 14th September 1897.

mortgaged property is to be sold to the mortgagee in case of default of payment of the mortgage money at the time fixed for it in the mortgage deed is invalid and cannot be enforced.

Kanaran v. Kuttooly.

Second appeal from the decree of the District Court of N. Malabar in A. S. No. 132 of 1896, affirming the decree of the Court of the District Munsif of Quilandy in O. S. No. 1 of 1895.

This was a suit to redeem mortgaged property. The 1st plaintiff mortgaged with possession certain buildings to the defendants in 1882. The mortgage deed stipulated that, in default of payment of the mortgage money in 3 years, the mortgagor was to sell the mortgaged property to the mortgagee. Among other pleas, the defendants contended that the agreement to sell was binding on the plaintiff and that the suit ought to be dismissed. The Courts below dismissed the plaintiff's suit. The plaintiffs then preferred this second appeal.

A. Narayanan Nambiar and *T. V. Narayanan Nambiar* for appellants.

V. Ryru Nambiar for 1st respondent.

The Court delivered the following

JUDGMENT:—The most important question in the case is whether the agreement in the mortgage, exhibit I, to sell the mortgaged property to the mortgagee in default of payment of the mortgage money is binding upon the mortgagor. Neither of the Courts below has considered this question. They have proceeded to deal with the agreement of sale as if it were valid. On the question as to its validity we have no hesitation in holding against it.

It is the policy of the law that the right of redemption in a mortgagor shall not be fettered or clogged in any manner or to any extent by an agreement between mortgagor and mortgagee, saving such transactions between the parties as would operate as an extinguishment of the right (See Proviso to S. 60 of the Transfer of Property Act). A transaction to have this effect must naturally be one entered into after the mortgage (See *Perayya* v. *Venkata*, I. L. R., 11 M., 403).

The present case is no doubt not governed by the terms of the Transfer of Property Act, the mortgage being prior to it; but

Kanaran v. Kuttooly.

at the date of the mortgage, the law was substantially the same. Since 1858, the principles applicable to mortgages in this Presidency are those administered by the Courts of Equity in England; according to which, agreements derogating from the right of redemption are treated as unenforceable. This principle is most strongly illustrated in the case of mortgages by conditional sale where the condition is held by the Courts to be inoperative. For other instances of the application of the principle, it is sufficient to refer to the cases of *Mahomed Muse* v. *Jijibhai Bhagvan*, I. L. R., 9 B., 524, and *Sayad Abdul Hak* v. *Gulam Jilami*, *Ib.* 20 B., 677, and to two recent English cases—*Field* v. *Hopkins*, 44 Ch. Div. 524, and *Salt* v. *Marquess of Northampton*, 92 A. C. 1. In this case the effect of the agreement was practically to deprive the mortgagor of the right to redeem after three years. The agreement must, therefore, be held to be invalid, and the defendants' contention that the plaintiffs are precluded by the above agreement from seeking to redeem fails. It becomes unnecessary to consider the other objections taken to the validity of that agreement.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Subrahmania Aiyar.

Lakshmana Aiyar ... Appellant * (*2nd Defendant*)

v.

Srinivasa Aiyar .... Respondent (*Plaintiff.*)

Lakshmana Aiyar v. Srinivasa Aiyar.

Hindu Law—Son's liability to pay father's debt, when—Limitation Act, XV of 1877, sch. ii, Art. 132—Attachment creates a charge.

A money decree was obtained against a Hindu in the year 1882 for the payment of a debt due by him which was neither immoral nor illegal. During his life-time, all his family property, including the shares of his sons was attached. He died in 1884, and in 1891 one of his sons put in a claim to the court executing the decree and got his share of the family property excluded from attachment. In a suit brought by the attaching creditor in 1892 to realise the decree debt from the son:

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* S. A. No. 1302 of 1896. 18th January 1898.

Held, that the attachment of the son's share during the father's life-time created a charge on such share in favor of the attaching creditor;

that the right to enforce such a charge arises on the date of the father's death within 12 years, from which date the charge could be enforced under Art. 132, sch. ii of the Limitation Act; and

that, consequently, the plaintiff's suit was not barred by limitation.

Lakshmana Aiyar *v.* Srinivasa Aiyar.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 262 of 1894, affirming the decree of the Additional District Munsif of Tinnevelly in O. S. No. 274 of 1893:

S. obtained a decree against A, a Hindu, in 1882. The debt for which the decree was obtained was a personal debt of A, and was neither illegal nor immoral. The family property of A, including the shares of his sons, was attached in execution of the decree during his life-time, and pending execution he died in 1884. In 1891, one of A's sons put in a claim petition and got his share of the family property released from the attachment. S, the original decree-holder, had in the meantime transferred the decree to the plaintiff who instituted this suit in 1892 to recover the decree debt from the son. The Courts below decreed the plaintiff's suit. The son then preferred this second appeal to the High Court.

V. C. Desikachariar for appellant.

R. Sivarama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The only point urged on behalf of the appellant (the 2nd defendant) was that the respondent's (the plaintiff's) right to proceed against the property in question in the hands of the appellant for the debt due under the decree obtained against the deceased father of the appellant had, at the time of the institution of the suit, become barred by limitation. The lower appellate Court held that it had not become barred, and that conclusion is clearly right.

No doubt, the decree against the father was for money only. But during the father's life-time an attachment in execution of the decree was made. The attachment was not of the father's share alone, but of the whole property; and, as the debt for which the decree was passed is not shown to have been incurred for an illegal

Lakshmana Aiyar v. Srinivasa Aiyar.

or immoral purpose, the respondent was entitled to attach the whole property for the debt. The effect of the attachment was to create as against the appellant a lien or charge in respect of the debt upon the whole property. This lien, the respondent can enforce under Art. 132 of the Limitation Act as against the appellant at any time within 12 years from the date of the father's death, since the decree amount must, in so far as the appellant is concerned, be deemed to have become due on the date the father died. The present suit was instituted within 12 years from that date. The contention for the appellant fails, and the second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Lakshminarayana ... ... Appellant* *(Plaintiff)*

v.

Ramajogigaru and others ... ... Respondents *(Defendants)*.

Lakshmi-narayana v. Ramajogi-garu.

Stamp Act, I of 1879, S. 34, Sch. I, Art. I, cl. 5 (c)—Letter containing statement of agreement not acknowledgment—Admission of documents, once made, final.

A partnership was formed on the 8th October 1885, for a term of 3 years for the purpose of carrying on trade in salt. K. L., one of the partners, sued the other partners for his share of the profits on the 23rd June, 1892. After the dissolution of the partnership in 1888, disputes arose between K. L., and the defendants as to the exact share of K. L., in the partnership business, and the matter was decided on a compromise. On the 26th June 1889, the defendants wrote a letter to K. L., in which they referred to this compromise and accepted it and then gave him an approximate amount of the profits standing to his credit. K. L. relied on this letter which was unstamped for saving his suit from the bar of limitation. The letter was admitted in evidence by the first Court without payment of stamp duty or any penalty.

Held: that the letter did not amount to an acknowledgment of any debt, but amounted to an agreement falling under Art. 5, Clause *(c)*, Sch. I, Stamp Act; and

that inasmuch as it had been admitted without payment of stamp duty and penalty, it could not afterwards, at any stage in the suit, be rejected as inadmissible in evidence.

Ramasami Chetti v. *Ramasami Chetti*,	I. L. R.,	5 M.,	220,	followed.
Khoob Lall v. *Jungle Singh*	„	3 C.,	787,	
Devachand v. *Hirachand Kamaraj* ...	„	13 B.,	449,	
Shiddappa v. *Irava*	„	18 B.,	737,	

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* S. A. No. 1264 of 1895. 30th March 1897.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 158 of 1893, reversing the decree of the Court of the District Munsif of Chicacole in O. S. No. 343 of 1892.

Lakshmi-narayana *v.* Ramajogi-garu.

K. L. had entered into a partnership with the defendants on the 8th October, 1885, for the purpose of carrying on trade in salt for a term of three years. After the dissolution of the partnership in 1888, disputes arose in the business as to the exact share of K. L., and it was finally settled on a compromise to be $\frac{1}{14}$th share.

Referring to this compromise and in reply to a letter from K. L., the defendants had written the following letter to him on the 26th June 1889:—

"The letter written by you on the 24th instant, to the effect that you agreed to one-fourteenth share as settled by Kattamuri Potanna Garu in regard to the disputes about arrangement of shares continued between you and us in Navupada Salt Manufacture business, and that accounts should be prepared and sent in that manner, was received and the contents thereof were understood.

You brought and showed a copy of the agreement saying that it was entered into between Nalam Virayya Garu and Poosarla Peda Sammanna Garu in Navupada regarding this transaction and showing that you were concerned as sub-sharer.

The dispute which you raised saying that you wanted higher share is not such that can be settled. But, as you have come to terms smoothly that you have agreed to the one-fourteenth share as per settlement effected by Katamuri Pottanna Garu as mediator, we too have agreed to it.

On striking balance of your accounts in respect of the said one-fourteenth share, the following figures are arrived at including the capital laid out by you:—Advances made by you from time to time—Rs. 1,175."

K. L. instituted the present suit for Rs. 2,500, after giving credit to sums received against the defendants on the 23rd June, 1892. The Munsif admitted the above letter in evidence although it was unstamped, without the payment of any stamp duty or penalty and decreed the plaintiff's suit. On appeal, the District Judge held that the letter amounted to an acknowledgment within Art. I,

Lakshmi-narayana v. Ramajogi-garu.

Sch. I of the Stamp Act and was inadmissible in evidence. He, therefore, rejected it and dismissed the plaintiff's suit. The plaintiff then preferred this second appeal.

C. R. Pattabhirama Aiyar for appellants.

H. G. Wedderburn and *E. Venkatarama Sarma* for respondents.

The Court delivered the following

JUDGMENT:—We do not consider that Exhibit A is an instrument chargeable with stamp duty of one anna under Art. 1, Sch. I of the General Stamp Act (I of 1897).

It is a letter setting forth the terms of compromise arranged between the parties with regard to the dispute between them regarding the plaintiff's share in the partnership business. There is no doubt an approximate statement of the value of that share, but this does not make it an acknowledgment intended to be used as evidence of the debt so as to fall within the article. When read with the letter to which it is a reply, it must, in our opinion, be treated as an agreement not otherwise provided for by the Stamp Act, and it was, therefore, chargeable with a duty of eight annas under Article I, cl. 5 (c) of Schedule I. As, however, it was admitted in evidence by the District Munsif without payment of stamp duty and penalty, the District Judge in appeal was precluded by S. 34 of the Stamp Act from rejecting it as inadmissible. This has been repeatedly decided by all the High Courts. (*Ramasami Chetti* v. *Ramasami Chetti*, I.L.R., 5 M., 220; *Khoob Lall* v. *Jungle Singh, Ib.* 3 C., 787; *Devachand* v. *Hirachand Kamaraj, Ib.* 13 B., 449; *Shiddapa* v. *Irava, Ib.* 18 B., 737).

The ground, therefore, on which the District Judge held that the claim was barred by limitation, fails.

We must, therefore, set aside his decree and remand the appeal for disposal on the merits and in accordance with law. Costs in this second appeal to be paid by the respondents in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. Justice Shephard, Mr. Justice Subrahmania Aiyar, Mr. Justice Davies, and Mr. Justice Boddam.

Marudamuthu Nadan and others ... Appellants * (*Plaintiffs*)

v.

Srinivasa Pillai and others ... Respondents (*Defendants*).

Marudamuthu Nadan *v.* Srinivasa Pillai.

Hindu law—Widow's estate, alienation of—Consent by nearest reversioner at the time of sale.

A Hindu widow transferred part of the property which she had inherited from her husband to a stranger with the consent of the then nearest reversioner to her estate. Subsequently, the reversioner died, and after him, the widow. In a suit by persons who were the nearest reversioners at the time of the widow's death to recover the property alienated by her:

Held, that the alienation was not, under the circumstances stated, binding on them and that they were entitled to recover the same.

Obiter:—Under the Hindu law a female holding a qualified heritage can validly surrender her estate to the then immediate reversioner so as to enable him to take and hold the estate absolutely as if the succession had opened to him by the natural or civil death of the qualified owner; but to effect this it is necessary that she should absolutely and unconditionally surrender the entire inheritance. *Behari Lal* v. *Madho Lal,* I. L. R., 19 C., 241, followed.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 537 of 1894, affirming the decree of the Court of the District Munsif of Tanjore in O. S. No. 680 of 1892.

The facts of the case appear sufficiently from the order of reference to the Full Bench.

This second appeal coming on for hearing before a Division Bench consisting of *Mr. Justice Subrahmania Aiyar* and *Mr. Justice Benson,* on Friday, the 2nd April 1897, their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH.

A Hindu widow having sold a portion of the property inherited by her from her husband, the plaintiffs, as reversioners, impeach the sale and sue to recover possession of the property. The finding of both the Courts is that the sale was not made for a

* S. A. No. 287 of 1896. 14th December 1897.

Marudamuthu Nadan v. Srinivasa Pillai.

necessity rendering it binding upon the reversioners as a sale. It is, however, contended before us that the consent of the then nearest reversioner, Kolandavelu Nadan, renders the sale binding upon the present plaintiffs, who were the reversioners entitled to the estate at the time the succession opened. The 1st and 2nd plaintiffs, but not the 3rd plaintiff, were, it is to be observed, in existence at the time of the sale.

The authorities bearing upon the question involved in the plaintiffs' (appellants') contention are not easily reconcilable, and the question itself is of considerable general importance.

We resolve, therefore, to refer for the decision of a Full Bench the following question, *viz.* :—

Whether the assent of the said Kolandavelu Nadan renders the sale binding upon all or any, and, if so, which of the plaintiffs ?

P. S. Sivaswami Aiyar for appellants.

C. R. Pattabhirama Aiyar for respondents.

Their Lordships expressed the following

OPINIONS :—*Shephard, J.*—In considering the question referred by the Division Bench, I think we may safely start from the position assumed by the Judicial Committee in *Behari Lal* v. *Madho Lal* (I. L. R., 19 C., 241), namely, "that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate." Whether the power thus conceded to the widow in Bengal should be allowed to her in this Presidency, where there is no such current of decisions as there is in the other Presidency, is a matter which it is not necessary to consider. The observation of the Judicial Committee is a strong authority for the proposition that if the next reversioner's consent by itself is to validate the widow's conveyance, that conveyance must be absolute having the effect of destroying the widow's estate altogether. In the case cited the grantee was at the date of the grant the apparent reversionary heir entitled to take on the death of the grantor, and the conveyance, though it seems to have comprised all the property, fell far short of amounting to an absolute surrender of her estate. It was argued that the case of alienations to strangers stood on a different footing

and that the consent of the apparent reversionary heir could take the part of legal necessity for the alienation so as to make it binding on the eventual heir. I do not think the dicta cited support this contention (*The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 M. I. A., 551; *Raj Lukhee* v. *Gokool Chunder, Ib.* 13, 209). The consent of the reversionary heir may afford evidence of a legal necessity justifying the widow's alienation, but apart from that, its efficacy is no other than that recognized in *Behari Lal* v. *Madho Lal.* It was further contended that the rule laid down by the Judicial Committee would be satisfied if the widow surrendered absolutely her entire interest in a particular part of the inheritance and that an alienation of that part might, therefore, be valid, notwithstanding that other property, being part of the inheritance, remained in her hands. The reasons for the rule show that this cannot have been the meaning of the Judicial Committee. The condition that the widow must surrender the whole inheritance if she desires to make a valid conveyance, must infallibly operate as a check on the frequency of such conveyances,—whereas it would practically be no check at all to require her to divest herself completely of her interest in some part only of the inheritance.

Marudamuthu Nadan v. Srinivasa Pillai.

I think we may fairly assume that the Judicial Committee, when making the observation cited, had before them the judgment of the Full Bench in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*, I. L. R., 10 C., 1102; and that, as I gather from the report, was a case in which the whole inheritance had been alienated by the widow (see particularly per *Garth*, C.J. p. 1108, and per *Mitter*, J., p. 1110).

I am of opinion that the question referred to us should be answered in the appellants' favour.

Davies, J.—I concur in the judgment of *Shephard*, J.

Boddam. J.—I agree.

Subrahmania Aiyar, J.—I am of the same opinion. I think it unnecessary to go into the question whether the Hindu Law according to the texts or the commentaries lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the

Marudamuthu Nadan v. Srinivasa Pillai.

qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which shew that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the courts. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances, the rule, as stated by the Judicial Committee in *Behari Lal* v. *Madho Lal*, (I. L. R., 19 C., 241) should, I think, be taken to be a rule applicable to this Presidency too, subject no doubt to the restriction pointed out by their Lordships, viz., that the surrender should be absolute and complete and that the whole limited estate should be withdrawn—a restriction that would guard against the injurious results which would follow if the rule were not so qualified. As, however, in the present instance the alienation by the widow was of but a part of the estate, the case must be held not to fall within the rule stated above.

The answer to the question referred, in my opinion, therefore, is that the assent of Kolandavelu Nadan does not render the sale binding upon any of the plaintiffs.

This second appeal coming on this day * for final hearing, the Division Bench delivered the following

JUDGMENT:—In accordance with the judgment of the Full Bench we must hold that the alienation is not binding on the plaintiffs.

In the result, we set aside the decrees of the Courts below and give judgment for plaintiffs for possession of the land sued for on their paying Rs. 230 within three months from this date, failing which the suit will stand dismissed with costs throughout. If the payment is duly made, each party will bear their own costs throughout.

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* 31st January 1898.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Municipal Council of Srivilliputtur ... ... Petitioner.*

v.

Chinnaboothanayagam Pillai ... ... Respondent.

Municipal Council of Srivilliputtur *v.* Chinnaboothanayagam Pillai.

District Municipalities Act, IV of 1884, S. 53—Professional tax—Exercise of profession, meaning of.

A contractor whose permanent place of residence was within the municipal limits of Srivilliputtur entered into a contract with the Department of Public Works whose office was also situated within the said municipal limits for the purpose of carrying on some works outside the Municipality. The contract was executed within the town, instructions to the contract were given him there, and money was to be paid him only there. But the works were executed outside the Municipality and the contractor for that purpose lived temporarily at the place where the work was being carried on.

Held: that, under those circumstances, the contractor *exercised his profession* within the Municipality within the meaning of S. 53, Madras Act, IV of 1884, and was, therefore, liable to be taxed.

Ramasami Ayyar v. *Municipal Council of Salem*, I. L. R., 18 M., 183, referred to.

Civil revision petition from the decree of the District Munsif of Srivilliputtur in S. C. No. 167 of 1897.

This was a suit to recover Rs. 12-8-0, being the amount of professional tax illegally levied from the plaintiff by the defendant on the 22nd August 1896, for the half year ending 30th September 1896. The plaintiff, a contractor living permanently in Srivilliputtur, entered into a contract with the Public Works Department, whose office was also within the municipal limits, for the purpose of carrying on some work outside the Municipality. The contract was entered at that office, instructions for the works were given to the contractor there, and the money was to be paid him then. The Municipal Council of Srivilliputtur levied him a profession tax from the contractor who thereupon filed the present suit to recover the money collected from him on the ground that he was not one of those liable to be taxed under S. 53 of District Municipalities Act. The District Munsif decreed the suit and the Municipal Council thereon preferred this revision petition to the High Court.

V. C. Desikachariar for petitioner.

R. A. Krishnaswami Aiyar for respondent.

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* C. R. P. No. 329 of 1897. 11th February 1898.

Municipal Council of Srivilliputtur v. Chinnaboothanayagam Pillai.

The Court delivered the following

JUDGMENT:—Most of the dealings that the contractor (respondent) had with the Department of Public Works in connection with his contracts took place in the Division Office of Srivilliputtur. The contract was executed there, instructions regarding the execution of works, the subject of the contract, were given him there, and payments on account of the contract were made to him there. Notwithstanding that the actual work was done outside municipal limits, the contractor was in the circumstances stated above clearly exercising his profession in the town. His case is analogous to that of the pleader in *Ramasami Ayyar* v. *Municipal Council of Salem*, I. L. R., 18 M., 183.

The respondent was, therefore, liable to be taxed, and in reversal of the lower Court's decree, we dismiss his suit with costs throughout.

In the view of our finding that the respondent "exercised" his profession in the municipal limits and is, therefore, liable to the tax, it becomes unnecessary to consider whether the Court had jurisdiction to entertain the action.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Ramakisoor Doss ... ... Appellant * (*3rd Defendant*)

v.

Sreerangacharlu and another Respondents (*Plaintiffs*).

Ramakisoor Doss v. Sreerangacharlu.

Civil Procedure Code, Ss. 2, 54, 373, 588—Suit, withdrawal of—Appeal from order allowing withdrawal of suit and costs.

The plaintiff in a suit applied to the Court for permission to withdraw it with liberty to bring a fresh suit in respect of the subject matter and the court allowed the withdrawal, passing an order directing the plaintiff's costs to be paid out of certain funds of which the defendant was trustee. The defendant appealed objecting to the award of costs.

Held: that the order of the Court as to costs was not a decree within the meaning of S. 2, C. P. C., and not being an order mentioned in S. 588, C. P. C., was not appealable.

Appeal from the order of the District Court of North Arcot, dated the 28th day of August 1896, passed on C. M. P. No. 349 of 1896, in the matter of O. S. No. 3 of 1892.

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* A. A. O. No. 158 of 1897. 17th January 1898.

Ramakisoor Doss v. Sreeranga-charlu.

The plaintiffs sued under S. 14 of Act XX of 1869 to dismiss B. D. from the office of *Mahant* of a devastanom and to declare the validity of the appointment of M. D. to the office. Subsequent to the institution of the suit, M. D. died, and K. D. was appointed to the office and brought on the record. The plaintiffs then applied to withdraw the suit under S. 373, C. P. C. The District Judge allowed the withdrawal, and in virtue of the power given him by S. 18 of Act XX of 1863, ordered that the costs of the plaintiffs be paid out of the funds of the devastanom. K. D. then preferred this appeal to the High Court.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*), *R. Shadagopachariar* and *S. Gopalasami Aiyangar* for appellant.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The order of the District Judge as to costs is not a "decree" within the definition of that word in S. 2, Civil Procedure Code, nor is the order one of those enumerated in S. 588, Civil Procedure Code, as subject to appeal. No appeal, therefore, lies (*Jogodindro Nath* v. *Sarut Sunduri Debi*, I. L. R., 18 C., 322). We dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Rathnamaiyar ... ... Appellant *. (*Petitioner*)

v.

Kristna Dos Vital Dos ... Respondent (*Counter-petitioner*).

Rathnamaiyar v. Kristna Dos Vital Dos.

Limitation Act, XV of 1877, S. 7, Sch. ii, Art. 165.—Application by minor through next friend.

Art. 165, Sch. ii, Limitation Act, is applicable not only to strangers but also to persons who are parties to, and bound by, the decree in execution of which the application is put in.

The word "application" in S. 7 of the Limitation Act includes an application to execute a decree, as well as an application relating to a matter arising in execution of a decree.

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* C. M. S. A. No. 46 of 189, 18th January 1898.

Rathnam-aiyar v. Kristna Dos Vital Dos.

A decree was obtained against a minor defendant, and in execution thereof the minor was dispossessed of some property. More than thirty days from the date of the dispossession, the minor applied through a next friend under S. 244, C. P. C., to set aside the sale.

Held: that the application was governed by Art. 165, Sch. ii of the Limitation Act; and

that by reason of the provisions of S. 7 of the Limitation Act, the application was not barred.

Rama v. *Venkatesa* ... ... I. L. R., 5 M., 171 } referred to.
Anantharamayyan v. *Karuppanan Kalingarayen* I. L. R., 4 M., 119 }

Appeal from the order of the District Judge of Trichinopoly in C. M. A. No. 34 of 1895, affirming the order of the District Munsif of Kulittalai in C. M. P. No. 887.

The facts of the case appear sufficiently from the judgment of the Court.

T. V. Seshagiri Aiyar for appellant.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The respondent obtained against the appellant and others a decree for the division of some lands held in common by the parties to the suit and for the delivery of the respondent's share thereof. In execution of the decree, some lands were delivered to the respondent. The appellant presented an application objecting to the delivery of certain of the parcels and complaining that he was dispossessed of them improperly. Both the lower Courts dismissed the application on the ground that it was barred by limitation. There can be no doubt as held by the lower appellate Court that Art. 165 is applicable to a case where the applicant is a party bound by the decree as well as where he is a stranger (See C. M. S. A. No. 25 of 1889), and that Article, therefore, is the one by which the present case is governed. But, though the application here was presented after the expiry of thirty days from the date of dispossession prescribed by that Article, yet it is clear that the application was in time, inasmuch as the applicant was, when the right to apply accrued to him as well as on the date of the application, a minor. For, unquestionably the case falls within S. 7 of the Limitation Act, XV of 1877. The respondent's pleader laid much stress on the Full Bench decision in *Rama Row* v.

Rathnam-aiyar v. Kristna Dos Vital Dos.

Venkatesa Bhandari, I. L. R., 5 M., 171. There it was held that property or right in S. 19 of the Limitation Act did not include such a right as that which entitles a party to a suit or proceeding to make certain applications in the course of such suit or proceeding. It is, however, difficult to see how this decision affects the present case. Now S. 7, by its very terms, applies to all applications for which a period of limitation is prescribed in the second schedule to the Act; and the application in question is, of course, one for which the schedule does prescribe a period. It is scarcely necessary to say that the appellant's application is not, as was assumed by the respondent's pleader in the argument, an application for execution of a decree, but one which relates to a question arising in execution between parties to the suit. Moreover, even if it were possible to treat the application in question as one for execution of a decree, it could not be held that S. 7 would be inapplicable to such an application. For *Ananthārama Ayyan* v. *Karuppanan Kalingarayen* (I. L. R., 4 M., 119) is a direct authority for the proposition that applications for execution of decrees come within S. 7.

The lower Courts were, therefore, in error in holding that the appellant's application was time-barred.

We set aside the orders of the Courts below and direct that the application be restored to the file and disposed of according to law.

The costs in this Court and in the lower appellate Court will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Sami Pillai ... Appellant * (*Petitioner*)

v.

Krishnasami Chetti and others ...Respondents (*Ctr. Petitioners.*)

Sami Pillai v. Krishnasam Chetti.

Civil Procedure Code, Ss. 244, 273, 311, 312, 588.—Attachment of decree—Person attaching not party to the decree.

Although by attachment of a decree belonging to his judgment-debtor, a decree-holder becomes entitled under S. 273, Civil Procedure Code, to execute the decree attached, he does not thereby become a party to or transferee of the attached decree within the meaning of S. 244, Civil Procedure Code.

* C. M. A. No. 63 of 1897. 9th December 1897.

Sami Pillai v. Krishnasami Chetti.

K in execution of a decree which he obtained against S attached a decree belonging to S under S. 273, Civil Procedure Code. The decree attached was then executed and some properties were brought to sale in such execution. S thereon applied to the Court to set aside the sale on various grounds, but his application was refused.

Held: that against that order, S was not entitled to appeal under S. 244, Civil Procedure Code, but that he had a right of appeal under Ss. 312 and 588, Civil Procedure Code.

Appeal from the order of the District Judge at Trichinopoly in M. P. Nos. 511 and 511-A of 1897, affirming the order of the Subordinate Judge of Trichinopoly in M. P. No. 433 of 1895 (in O. S. No. 21 of 1894).

In O. S. No. 21 of 1894, K obtained a decree against S, and in execution of that decree attached a decree belonging to S and which he had obtained against third parties in O. S. No. 5 of 1888. In execution of the decree in O. S. No. 5 of 1888, some properties were attached and brought to sale. S then applied to the Court to set aside the sale alleging material irregularity in the conduct of the sale and consequent substantial injury to him. The District Judge, however, dismissed the application. S then preferred this appeal to the High Court.

V. C. Desikachariar for appellant.

The Officiating Advocate-General (V. Bhashyam Aiyangar), V. Krishnaswami Aiyar, T. Ranga Ramanujachariar, and *R. A. Krishnaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—We must hold that the appellant is not entitled to appeal under S. 244, Civil Procedure Code. No doubt, the respondents 1 to 3 as attaching creditors in O. S No. 21 became entitled to execute the decree in O. S. No. 5, but the sale took place in execution of the latter decree, and so far as O. S. No. 5 is concerned, the respondents cannot be held to be parties to the suit so as to entitle the applicant to treat any question arising between him and them as one under S. 244. We, however, think that he is entitled to appeal under S. 311. The right of the said respondents to execute as attaching creditors of the decree in O. S. No. 5 is a special right created by S. 273, Civil Procedure Code. But they do not thereby become transferees of the decree as was contended on their

behalf before us. The holder of the decree in O. S. No. 5 remains decree-holder notwithstanding the attachment of his rights, and as such he was entitled to apply under S. 311 and to appeal against the order passed under that section. Turning now to the merits, the only irregularity that was pressed before us as vitiating the sale was that lot No. 1 of the property was sold in five sub-lots. Having regard to the facts stated by the Judge in his order and to the other circumstances of the case, we do not think that this was an irregularity at all, but was a prudent step in the interest of all concerned. The result is that we dismiss the appeal with costs—two sets.

Sami Pillai *v.* Krishnasami Chetti.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Benson.

Venkayya ... ... Appellant* (*Respondent*),

v.

Raghavacharlu ... ... Respondent (*Appellant*),

Venkayya *v.* Raghavacharlu.

Civil Procedure Code, Ss. 230, 583—Restitution, execution of decree for—Limitation Act, Sch. II, Art. 179—Restitution barred after 12 years.

Applications made to obtain restitution under a decree in accordance with S. 583, C. P. C., are proceedings in execution and as such are governed by the rules of limitation prescribed by S. 230, C. P. C., and Art. 179, Sch. II of the Limitation Act (XV of 1877).

Nand Ram v. Sita Ram, I. L. R., 8 A., 545, followed, *Kurupam Zamindar v. Sadasiva, Ib.* 10 M., 66, distinguished.

Appeal under S. 15 of the Letters Patent from the order of *Mr. Justice Parker* passed on C. M. S. A. No. 13 of 1895, presented against the order of the District Court of Nellore in C. M. A. No. 3 of 1894.

The plaintiff in O. S. No. 127 of 1879, on the file of the District Munsif's Court of Kavali, got a decree in his favor in the first Court. This decree was reversed in second appeal by the High Court on 9th January 1882. Before the final disposal of the suit in the High Court, the plaintiff executed the decree passed in his favor by the lower Courts and recovered from the defendants the amount

* L. P. A. No. 39 of 1896. 26th February 1897.

Venkayya v. Raghavacharlu.

decreed to him. The defendant after the decree of the High Court applied for restitution on the 9th January 1894. Previous to this, he had applied on the 25th August 1891, and recovered a portion of the money which he had paid to the plaintiff in execution. No other proceedings had been taken in respect of this restitution. In the present application, the defendant had stated that he was unable to take steps earlier in this matter owing to the fraud of the plaintiff and that, consequently, the 12 years rule of limitation prescribed by S. 230, C. P. C., ought not to prejudice his application. The District Munsif dismissed the application saying:—

"This petition is put in after 12 years. No specific allegations of fraud or force are set forth in the petition. The allegations in the petition are so vague as not to constitute any specific fraud. Application struck off as barred."

The defendant then appealed to the District Court and the District Judge confirmed the order of the Munsif in the following words:—

"I see no reason to interfere with the order of the District Munsif except that the judgment-debtor's house was found locked; there is no other allegation of fraud. The appeal is dismissed with costs."

The defendant then appealed to the High Court and his Lordship *Mr. Justice Parker* reversed the order of the lower Courts, and in remanding the case to be re-heard, passed the following judgment:—

"I have no doubt that proceedings taken for obtaining restitution under S. 583, C. P. C., are proceedings in execution of the decree. The petition itself is put in under S. 230, and execution will be barred under the 12 years rule unless the defendant has by fraud or force been prevented from executing the decree.

"The District Munsif held that no specific allegations of fraud were alleged, but in this he is not quite correct. Fraudulent conduct was alleged in that plaintiff had set up various persons to bring suits. It would of course be further necessary to show that, by reason of these proceedings, defendant had been prevented from executing the decree.

"The order of the District Judge is difficult to understand. It does not appear that any allegation of fraud founded upon locking up the house was alleged in the petition.

Venkayya *v.* Raghava-charlu.

"The order is set aside and the appeal remanded to the District Court to be re-heard. Costs will follow the result."

The plaintiff then preferred this Letters Patent appeal from the order of *Mr. Justice Parker.*

T. V. Seshagiri Aiyar for appellant.

C. Ramachandra Rao Saheb for respondent.

The Court delivered the following

JUDGMENT :—We have no doubt but that the learned Judge is right in holding that applications made to obtain restitution under a decree in accordance with S. 583, Civil Procedure Code, are proceedings in execution of that decree, and are governed as regards limitation by Art. 179 of the second schedule of the Limitation Act. This is in accordance with the view taken in *Nand Ram* v. *Sita Ram,* I. L. R., 8 A., 545.

The appellant's vakil relies on a remark in the case reported in *Kurupam Zamindar* v. *Sadasiva,* I. L. R., 10 M., 66, to the effect —that the learned Judges in that case were disposed to think that the application in a similar case was governed by Art. 178. That remark, however, is a mere *obiter dictum,* and as such is not binding on us. One of the Judges who took part in that case is the learned Judge whose order in the present case rules that Art. 179 is the article properly applicable.

The appeal, therefore, fails and we dismiss it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Kandi Unichaman ... ... Petitioner* (*Plaintiff*)

v.

Ahmed Kutti Kayi and others ... Respondents (*Defendants*).

Kandi Unichaman *v.* Ahmed Kutti Kayi.

Limitation Act XV of 1877, Art. 97, 116, 120—Faction of mortgagor to secure possession—Suit by usufructuary mortgagee for money.

Where a usufructuary mortgagee sues for the money, the mortgagor having failed to secure him in possession, the period of limitation is six years whether Art. 120 or 116 be applicable.

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* C. R. P. No. 102 of 1897. 8th December 1897.

Kandi Unichaman v. Ahmed Kutti Kayi.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of South Malabar, Calicut, in S. C. No. 182 of 1896.

The deceased karnavan of the defendants had executed a kanom to the plaintiff, dated 25th November 1888. The defendants having failed to secure the mortgagee in possession, the plaintiff brought this suit for the money. The Sub-Judge held the suit barred under Art. 97 of the Limitation Act. The plaintiff applied in revision to the High Court.

C. Krishnan for petitioner.

Ryru Nambiar for respondents.

The Court delivered the following

JUDGMENT:—We think that the Subordinate Judge was wrong in holding that the suit was barred under Art. 97, Sch. ii of the Limitation Act. The claim is for money, but on a usufructuary mortgage, the cause of action being the failure of the mortgagor to secure the mortgagee in possession. The liability to secure the mortgagee in possession or in default, to repay the mortgage money, is not a liability arising under the common law on the ground of failure of consideration, but is a liability imposed by S. 68 of the Transfer of Property Act. If this liability be taken to be one arising under a covenant implied by law as incidental to the mortgage contract (which was in writing and registered), Article 116 of the Limitation Act would apply. Otherwise, the appropriate Article is 120, the case not being otherwise provided for. In either view, the suit is not barred since it was brought within six years from the time when the cause of action accrued. The case of *Sawaba Khandapa* v. *Abaji Jotirav*, I. L. R., 11 B., 475, is distinguishable from the present by the fact that when it was decided, the Transfer of Property Act was not in force in Bombay. We, therefore, reverse the decree of the lower Court and remand the suit for disposal on the merits.

Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Raja Velugoti ... Petitioner* (*Plaintiff*).

v.

Venkata Rao ... Respondent (*Defendant*).

Act IX of 1887, Sch. II, Art. 11 and 13—Jodi—Small Cause nature.
A suit for jodi is cognizable by a Small Cause Court.

Raja Velugoti *v.* Venkata Rao.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the District Munsif of Nellore in S. C. S. No. 679 of 1896.

This was a suit for Rs. 25 and odd claimed as goods payable by the defendant. It was objected that the Munsif could not try it on the Small Cause side. This was upheld and the Munsif ordered the return of the plaint. Hence this revision petition to the High Court.

V. C. Desikachariar for petitioner.

The respondent appeared in person.

The Court delivered the following

JUDGMENT:—We do not agree with the District Munsif in holding that jodi is a cess or due of the kind referred to in sch. ii, cl. (13) of the Provincial Small Cause Courts Act. The general word "dues" in that article must be taken to be dues similar in kind to the special dues mentioned in the article. In the present case the claim is for "jodi," which is rent on favourable terms, Article 11 of schedule ii has no application whatever.

The claim was therefore cognizable by the Small Cause Court.

We set aside the order and direct the District Munsif to receive the plaint and dispose of it according to law.

Costs will abide and follow the result.

* C. R. P. No. 74 of 1897. 8th December 1897.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson

Subrahmania Pillai ... ... Petitioner*

v.

Muthukutti ... Respondent.

Subrahmania Pillai v. Muthukutti.

Civil Procedure Code, S. 78—Service by affixing during defendant's temporary absence.

When summons was affixed to the house by the process-server during the temporary absence of the defendant:

Held, that the process was not good.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge of Tinnevelly in C. M. P. No. 1261 of 1896 (Small Cause Suit No. 1427 of 1896).

This was an application to set aside a decree on the ground that the defendants were not properly served. The Munsif rejected the application. The petitioner applied in revision to the High Court.

S. R. Ramasubba Aiyar for petitioner.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We do not think that the service in this case was proper. Mere temporary absence of the person to be served does not justify the process-server affixing the summons to the door. (*Bhomshetti* v. *Umabai*, I. L. R., 21 B., 223.) It is the duty of the peon to take some pains to find out the person to be served, so that, if possible, personal service may be effected.

We must set aside the decree and direct that the Subordinate Judge do restore the suit to his file and dispose of it according to law.

Costs will abide and follow the result.

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* C. R. P. No. 102 of 1897. 10th December 1897.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

The Agent and Manager of the Madras Railway Company for the Madras Railway Company. } *Petitioner** (*Defendant*)

v.

Govinda Rao ... ... *Respondent* (*Plaintiff*)

The Agent and Manager, M. R. Co., *v.* Govinda Rao.

Breach of contract—Damages too remote—Indian Contract Act, Ss. 73, *Ill.* (*q*), 151, 152, 161—Indian Railways Act IX of 1890, S. 72.

The plaintiff, a tailor, with a view to making profits by sale of coats and other wearing apparel at a festival at K, entrusted the defendants (Railway Company) with a sewing machine, a bundle of clothes at E to be carried from that place and delivered to him at K. The plaintiff, however, did not inform the Company as to who or what he was, or why the articles were being sent. The goods were, however, delayed in the despatch by the negligence of the Company's servants, and they did not reach K till after the festival was over. In a suit by the plaintiff for damages sustained by the breach of contract:

Held: that (1) the trainage expenses of the plaintiff and his agent from E to K and back, (2) expenses for their lodgings at Karamadai and (3) rent paid for a shop engaged by them for the purpose of carrying on business,

were not recoverable, as being damages too remote;

and that the falling off in value of the cloth due to its not having been delivered in time to be utilised at the festival at K was "deterioration" within the meaning of S. 72, Ind. Rail. Act IX of 1890; but that, since there was no allegation or proof of any such deterioration, the plaintiff could not recover any damages.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Erode in Small Cause Suit No. 1490 of 1896.

The facts of the case appear sufficiently from the judgment of *Subrahmania Aiyar*, J.

R. A. Nelson and *Barclay, Orr and David* for petitioner.

The respondent was not represented.

The Court delivered the following judgment:—

Subrahmania Aiyar, J.—The plaintiff, a tailor, with a view to make special profits during the car festival at a place called Karamadai, in the Coimbatore District, entrusted to the defendants, the Madras Railway Company, on the 29th February 1896, his sewing machine and a cloth bundle to be carried from Erode and to be delivered to him at Karamadai. The defendants were,

* C. R. P. No. 80 of 1897. 1st February 1898.

The Agent and Manager, M. R. Co., v. Govinda Rao.

however, not told why the articles were sent. Through the fault of the defendants' servants, the articles were not carried to Karamadai until long after the date by which they should, in the usual course, have arrived at that station. Before they reached the place, the festival had come to an end. The plaintiff who had waited at Karamadai for a number of days, expecting the arrival of the articles, having returned to Erode, the articles were transmitted back and were delivered to him there on the 26th March 1896.

The plaintiff sued for damages said to have been sustained by him in consequence of the delay in the delivery of the articles. The District Munsif gave him a decree for Rs. 16-4-0, being the rail fare of the plaintiff and his assistant from Erode to Karamadai and back and their expenses for food and lodging while at Karamadai.

The first question that arises is whether the plaintiff is precluded from maintaining this suit by one of the conditions printed on the back of the forwarding note, Exhibit I. That condition is to the effect that the defendants are not responsible for any loss of, or damage to, the goods by reason of accidental or unavoidable delay in transit or otherwise. It no doubt appears that Exhibit I was neither read nor explained to the plaintiff. But assuming that he was in fact ignorant of the condition in question, that does not affect the binding character of the contract evidenced by Exhibit I, inasmuch as in the portion thereof which bears his mark it is expressly stated that he was aware of the conditions on the back and that he agreed to the articles being carried subject to such conditions. (Per *Mellish*, L. J., in *Parker v. South-Eastern Railway Company*, at p. 421, L. R. 2 C. P. Dn). He is therefore precluded from maintaining this suit, unless such a condition is void under S. 72 of the Indian Railways Act. The question then is whether the contract between the plaintiff and the defendants in so far as it purports to exonerate the latter from responsibility for delay is, as held by the District Munsif, void under S. 72 of the Railways Act IX of 1890. In discussing this point, I shall proceed on the supposition that the condition covers a delay which, as found here, was neither accidental nor unavoidable. The section referred to in so far as it is material for our present purpose runs thus:

"72. (1) The responsibility of a railway administration for the loss, destruction or deterioration of * * goods delivered to the

The Agent and Manager, M. R. Co., v. Govinda Rao.

administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far it purports to effect such limitation, be void unless it—

* * * *

(b) is otherwise in a form approved by the Governor-General in Council.

* * * *"

Now, in the present case, there was no loss or destruction of the articles consigned and the applicability of the section to the case depends upon the question whether there was, within the meaning of the enactment, a "deterioration" for which the contract purports to render the defendants not responsible, since the words "damage to the goods" in the contract may be taken to comprehend deterioration. The word deterioration imports the becoming reduced either in quality or in value (see the Standard Dictionary). Having regard to the nature of the articles and to the very limited delay, it is not possible to suggest that any deterioration in quality could have taken place. As regards the value of the cloth, however, it might well have been shewn to have been otherwise with reference to what was laid down in *Wilson v. Lancashire and Yorkshire Railway Company* (30 Law Journal, C. P., p. 232). There the plaintiff, a cap manufacturer, sued the defendants for damages caused by the improper delay in delivering some cloth. The plaintiff had bought the articles with a view to make it into caps for sale during the spring season of the year; but owing to the delay in transit, the plaintiff was unable to sell or use any part of it or to manufacture any part of it into caps for sale in that season. Referring to the fall in the value of the cloth that could be shewn to have taken place in consequence of the same arriving at a time when it was less in demand and less capable of being applied to an immediate use, *Williams, Willes* and *Keating*, JJ., spoke of it as "deterioration," and those learned Judges as well as *Byles*, J., held that in respect of such fall, the same being the direct and natural result of the delay, the carrier was liable even in the absence of notice of the purpose for which the article was sent. Clearly, therefore, in the case before us if the plaintiff had alleged and proved that, owing to

The Agent and Manager, M. R. Co., v. Govinda Rao.

the loss of the special opportunity for sale of which he wished to take advantage, the cloth had fallen in value compared to what he could have got for it had he been able to dispose of it at Karamadai as he intended, the plaintiff would have been entitled to a finding that there was a "deterioration" within the meaning of S. 72, and that the condition relied on as operating to limit the responsibility of the defendants in respect of such deterioration is void, inasmuch as the contract is not shown to have complied with the provision contained in clause (*b*) of the section. But the plaintiff dit not allege and prove that there was any deterioration as just explained. S. 72 does not, therefore, apply to the case, and it follows that the condition in question precludes the plaintiff from claiming the damages awarded to him by the District Munsif, since they are not due to any deterioration of the articles consigned. I should add that there was another objection, which the District Munsif overlooked, to those damages being allowed. They consist, as will be seen from what has already been stated, of the trainage for the plaintiff and his assistant from Erode to Karamadai and back, rent paid at Karamadai for the shop engaged by the plaintiff for doing his work as a tailor and food expenses for the plaintiff and his assistant during the time they were waiting at Karamadai for the arrival of the articles. It is scarcely necessary to point out that none of these expenses was the proximate and direct consequence of the delay in the delivery of the articles and were therefore not awardable as *natural* damages (see *Woodger* v. *The Great Western Railway Company*, L. R. 2, C. P. 318, and *Gee* v. *Lancashire and Yorkshire Railway Company*, 30 L. J. Exch. 11) as the difference between the price which could have been obtained at the festival and that on the date when the cloth was returned to the plaintiff would have been (*Wilson* v. *Lancashire and Yorkshire Railway Company*, already cited). No doubt had the plaintiff caused intimation to be given to the defendants when the articles were entrusted to them that he wanted them for sale or use at the festival, it may be that the items allowed by the District Munsif would be awardable as damages within the *contemplation* of the parties. But, as already stated, the defendants were not informed, when they undertook to carry the goods, that these were required by the plaintiff at the specific time at which and for the specific purpose for which he wanted them at Karamadai. The items

allowed by the District Munsif were therefore too remote and ought not to have been decreed.

The Agent and Manager, M. R. Co., *v.* Govinda Rao.

For all the reasons stated above I would set aside the decree of the District Munsif and dismiss the suit, but, in the circumstances, without costs.

Benson, J.—The question for our decision is how far the Railway Company is liable for damages said to have been caused to the plaintiff by the Company's failure to deliver certain goods to the plaintiff within a reasonable time after they were entrusted to the Company to be carried from Erode to Karamadai. It is admitted that the Railway Company had no notice that the goods were required to be delivered within a fixed time for any special reason. Apart from any special contract, the responsibility of a Railway Company for the loss, destruction or deterioration of goods is declared by S. 72 of the Railways Act (IX of 1890) to be that of a bailee as defined in sections 151, 152 and 161 of the Indian Contract Act, and the last section enacts that "if, by the fault of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time." In the present case there was no loss or destruction of the goods,—nor was there any change in the absolute condition of the goods, but the word "deterioration" is wide enough to cover a falling off in the value of the goods due to their not having been delivered in time to enable the plaintiff to take advantage of the special market which would have been available during the festival at Karamadai if they had been delivered in due time. In other words, the plaintiff might have claimed as damages the difference between the ordinary value of the goods at Karamadai and the special value which they would have had if they had been delivered to him at the time contemplated so as to be available for the special market then existing at Karamadai (*Wilson* v. *Lancashire and Yorkshire Railway Company*, 30. L. J. C. P. 232, and illustration *q* to section 73 of the Indian Contract Act, which illustration appears to be based on the English case). The plaintiff, however, did not allege or prove any such "deterioration,". though there was a vague claim and vague evidence as to "loss of profit" owing to delay in delivery. It was, however, distinctly held in the above case, and

The Agent and Manager, M. R. Co., v. Govinda Rao.

illustration *q* to S. 73 of the Contract Act distinctly shows that the plaintiff could not in such a case recover any damages for loss of profit. If "deterioration" in the sense above stated had been proved, the Railway Company would not have been protected by the special contract on the back of the forwarding note to the effect that the Company is not liable "for any loss of, or damage to, any goods whatever by reason of accidental or unavoidable delays in transit or otherwise," since the contract does not exclude "deterioration" in the above sense, but only loss of, or damage to, the goods unless indeed the words "damage to the goods" can be held to include "deterioration" due to extrinsic causes. Even if they could be so held (and I think it would be a strain on the language to do so), there is still the objection that it is not shown that the contract was in a form approved by the Governor-General in Council as required by S. 72 of the Railways Act, and it may well be doubted whether sanction would have been given for so unreasonable a contract. For all these reasons, the District Munsif was, I think, right in disallowing the plaintiff's claim for loss of profits, but I think he was wrong in allowing the plaintiff the rail fare of himself and his assistant from Erode to Karamadai and back, and the cost of their food and lodging at Karamadai. Such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach, since the Railway Company had no notice of the reason why the things were being sent to Karamadai, or of the arrangements which the plaintiff was making to utilise them there. In other words, these damages are too remote and do not fall within the purview of S. 73 of the Contract Act. I agree, therefore, in holding that the decree must be set aside and the suit dismissed, but in all the circumstances without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Krishnappa Holla and another. ... Appellants* (*Counter-petitioners*)

v.

Savitri ... Respondent (*Petitioner*).

Krishnappa Holla *v.* Savitri.

Civil Procedure Code, S. 231—Joint decree-holders—Execution by one alone—Judgment-debtor has no right to object.

Where a decree is passed in favor of more persons than one, anyone of them can execute the whole decree subject to the rights of the other decree-holders being protected by order of Court. The judgment-debtor has no right whatever to object to such execution being allowed.

Appeal from the decree of the District Court of South Canara in A. S. No. 371 of 1894 affirming the decree of the District Munsif of Kundapur in execution case No. 195 of 1894.

The facts of the case sufficient for the purpose of this report appear from the judgment of the Court.

K. Narayana Rao for appellants.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The Courts below were wrong in supposing that the decree was passed in favour of one plaintiff only. On referring to the original decree, we find it was in favour of the plaintiffs. But any one of the plaintiffs may under S. 231-*c* of the Civil Procedure Code apply for execution subject to the rights of the other plaintiffs being protected by order of the Court. None of the other plaintiffs has objected to the execution having been granted to the respondent. It is not for the judgment-debtors (appellants) to object. If any arrangement has been come to between them and any of the plaintiffs, that arrangement cannot be recognized by the Court as it has not been duly certified. We dismiss the appeal with costs.

* A. A. A. O. No. 88 of 1897. 11th February 1898.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Kuthiravattath Nair ...	Appellant* in Appeal No. 133 and Respondent in Appeal No. 129 (*Defendant*).
Manavikkrama	Respondent in Appeal No. 133 and Appellant in Appeal No. 129 (*Plaintiff*).
Manavikkrama	Appellant in Appeal No. 130 (*Plaintiff*).
Puliakot Mutha Nair and another	Respondents in do. (*Defendant* and *his representative*).
Manavikkrama	Appellant in Appeal No. 131 (*Plaintiff*).
Nallapata Nair and another ...	Respondents in do. (*Defendant* and *his representative*).
Manavikkrama	Appellant in Appeal No. 132 (*Plaintiff*).
Ullattil Thodiga Amma Neithiar.	Respondent in do. (*Defendant*).

Kuthiravattath Nair *v.* Manavikkrama.

Civil Procedure Code, S. 43—Limitation Act, XV of 1877, Sch. II, Arts. 142 and 144—Adverse possession of tenant in common—When tenant's possession adverse to landlord.

Where two persons are tenants in common of various items of properties, and one of them has obtained decrees for partition of some of the items in suits to which the other tenant in common and tenants holding the properties under them were parties, S. 43 does not bar a fresh suit by the same plaintiff for partition of the remaining items.

Per Shephard, J.—The causes of action are not the same in the former and the present suits, because the right on the part of a tenant in common to have each field separately divided between himself and his co-tenants is one thing and the right to claim a partition of all the fields held by them as tenants in common is another thing.

Per Subrahmania Aiyar, J.—The cause of action relied on in the previous suits though erroneous, being that the plaintiff was entitled to a partition confined to the particular parcels comprised in the demises to the tenants who were impleaded in each suit, was different from that upon which the present suit was based, namely, to a general and complete partition of the entire property held by the plaintiff and the defendant.

* Appeals 133 & 129 to 132 of 1894. 17th December 1897.

Kuthiravattath Nair v. Manavikkrama.

Per Shephard, J.—Where property was in possession of two persons as tenants in common and held under them by a tenant, mere non-participation of the profits by one of the owners and exclusive occupation by the other is not sufficient to make a case of adverse possessions. Even where the original tenant and a member of his family attorns to one of the owners or a stranger pays off the former tenant and attorns to such owner, the possession of the tenant and of such owner is not adverse to the other owner unless the tenancy has been determined in the one case or the other owner has notice of the adverse possession in the other. Mere denial of a landlord's title does not determine the tenancy unless the landlord does some act showing his election to accept the forfeiture.

Per Subrahmania Aiyar, J.—During the subsistence of a tenancy, assertion of title by the tenant does not render his possession adverse. Such assertion after the determination of his tenancy or attorning and paying rent to a stranger who asserts title, makes the possession adverse provided the owner has knowledge of the facts. In the case of tenants in common there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

Appeals from the decrees of the Subordinate Judge's Court of Palghat in O. S. Nos. 41, 42, 22 and 43 of 1887.

The facts of the case necessary for the purpose of this report appear from the judgment of the Court.

V. Bhashyam Aiyangar (The Officiating Advocate-General), C. Sankara Nair, V. C. Desikachariar, K. P. Govinda Menon, and *M. Bhaskara Menon* for appellant.

P. R. Sundara Aiyar, K. R. Subrahmania Sastri and *K. Srinivasa Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS :—*Shephard, J.*—The first point taken in the argument of this appeal is that raised by the 3rd issue. It appears from the evidence, and indeed is in a measure admitted in the plaint itself, that before this suit was launched several suits were brought by the plaintiff or his predecessor against the defendant or his predecessor, in some of which suits decrees were obtained by the Zamorin for the partition of the particular parcels comprised in such suits. In each of these suits the tenant, who, as the plaint states and is admitted, held half under the Zamorin and half under the Nair, was joined as a party. So far as regards the tenant, the plaint made such allegations and asked for such relief as would be made and asked for against any tenant holding under a *jenmi,*

Kuthira-vattath Nair v. Mana-vikkrama.

while as regards the Nair, the plaint asked for partition, so that in the result the tenant might be left in undisturbed possession of the moiety allotted to the Nair. Independently of these suits there was another suit brought against the Nair alone in which a division of the *devasvom* property was sought for. That suit was dismissed on the ground that such property was not partible.

In these circumstances we are asked to hold that S. 43 of the Civil Procedure Code applies and that the plaintiff, having in his former suits omitted to sue in respect of the property now in question, is precluded from maintaining the present suit for partition of that property. Stated in the abstract, the question may be said to be whether one of two tenants in common, having sued for partition of part of the property so held by them, is at liberty to bring a separate suit for the remainder of the property. Now, it is quite clear that, in applying S. 43 of the Code, it has first to be seen whether the cause of action alleged in the plaint is identical with the cause of action alleged in the former suit (*Pittapur Raja* v. *Suriya Rau*, I. L. R., 8 M., 524; *Mussummat Chand Kour* v. *Partab Singh*, L. R., 15 I. A., 157; *Munshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, 11 M. I. A., 605) and that by the term cause of action must be understood all the circumstances alleged by the plaintiff to exist which, if proved or admitted, will entitle him to the relief prayed for (L. R., 15 I. A. 158; *Read* v. *Brown*, 22 Q. B. D., p. 131). The class of cases to which S. 43 is intended to apply is indicated by the illustration. Where there has been an infringement of one right and one cause of action has arisen, the plaintiff must make his whole claim once for all in one suit. For instance, a plaintiff, who complains of wrongful detention or misappropriation of his securities, cannot, after recovering the securities or some of them in one action, afterwards sue to recover the remainder or damages for the detention of them (11 M. I. A., *p.* 605; *Serrao* v. *Noel*, 15 Q. B. D. 554). There being one single cause of action and the plaintiff having had "an opportunity in the former suit of recovering what he seeks to recover in the second, the former recovery is a bar to the latter action." The rule of law embodied in S. 43 operates not to give the defendant a ground of exception to the first suit, but, by prohibiting a second suit, indirectly to compel the plaintiff to include his whole demand in the first suit. There are, however,

Kutkira-vattath Nair v. Mana-vikkrama.

cases in which the nature of the right is such that independently of S. 43 the plaintiff is prohibited from severing his claim. For example, a mortgagor cannot redeem part of the mortgaged property on payment of a proportionate part of the mortgage debt. It is the right of the mortgagee to retain the whole security for any part of the debt. If the mortgagor chose to relinquish a part of the mortgaged property and sought to recover the remainder on payment of the whole debt, the mortgagee would have no reason to complain and he would, under S. 43, have a complete answer to a second suit brought to recover the omitted part (see *Ukha v. Daga*, I. L. R., 7 B., 182). But it is another question whether when a prayer for partial redemption has been granted or refused, the mortgagor can institute another suit. If the prayer were refused, that is, if the mortgagee insisted on his right to have the whole mortgage redeemed once for all, I conceive that the dismissal of the first suit would clearly be no bar to the institution of a second and properly framed suit. The decision cited from 8 B., H. C. R., is an authority, if any is needed, on this point. Would it make any difference if the prayer for partial redemption were granted, with the result that the mortgagee was allowed to remain in possession of part of the property as security for the unpaid portion of the debt? The difference is one not recognized in S. 43 and, therefore, if there is any distinction to be drawn the reason for it must be sought elsewhere. In the case above cited the plaintiff, a member of an undivided family, had first demanded a share of a particular portion of the family property. That suit had been dismissed on the ground that it was not properly framed. The plaintiff then sued to have the whole property brought together and divided. It was observed by *Melvill*, J., with reference to the argument that this suit was barred by S. 7 of the Code of 1859, that "so far from these two being the same cause of action, they present all the difference which is expressed by saying that the one is a cause of action and the other is no cause of action." This observation, it appears to me, would have been none the less true if the first suit instead of being dismissed had been decreed in the plaintiff's favour. The cause of action as alleged in the plaint cannot be altered by the result of the suit. Nor can it possibly be held that a decree for partial redemption or partial partition estops the plaintiff from claiming redemption or partition of the rest of the property or from alleging that it is held by the defendant as mortgagee or tenant in common. If there is

Kuthira-vattath Nair v. Mana-vikkrama.

any estoppel in the matter, it is rather against the defendant than against the plaintiff. In the present case it appears to me that the right put forward in the former suits is different from that put forward in the present suit and that, therefore, there is no identity of causes of action. The right on the part of a tenant in common to have each field separately divided between himself and his co-tenant is one thing: the right to claim a partition of all the fields held by them as tenants in common is another thing. There has no doubt been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort. To hold that that circumstance prohibits a general suit for partition would lead to the remarkable conclusion that the tenancy in common in respect of the yet undivided lands must continue indissoluble except by consent of the parties or perhaps by suit instituted by the Nair. As far as the Zamorin is concerned, he must for ever be in the position of a tenant in common who has no right to partition. Similarly in the analogous case of mortgagor and mortgagee, the latter, it is supposed, may continue to hold part of the land under the mortgage, while the former is debarred from bringing any further action. In both cases, the explanation is the same. It cannot be said that the causes of action are identical when the one plaint omits matters which the defendant is entitled to have included and the other is not open to that exception.

These reasons are sufficient, without any discussion of the circumstances of the different suits that have been brought by the Zamorin, for holding that the present suit is not barred by the provisions of S. 43. I would only add that I do not think the cases relied on by the Advocate-General in which a member of an undivided family has been permitted to sue his co-partner and a purchaser from the latter for partition of the property purchased, can be called in aid in the present case. In that class of cases it may be said that the plaintiff, adopting the alienation and seeking to have the purchaser's right defined, consents to a separation of the particular property from the rest of the family estate. The circumstances in the present case are entirely different.

The other point urged with regard to several of the parcels of land comprised in the suit was that of limitation. It was contended that, in the circumstances of this case, the suit fell within article

142 of the schedule to the Limitation Act, and that, therefore, the burden lay on the plaintiff of proving that possession remained with him till some time within twelve years of the institution of the suit. The answer to this, in my opinion, is that it must not be assumed that the plaintiff has been dispossessed so as to render article 142 applicable to his case. The defendant's possession must *primâ facie* be referred to the title in virtue of which it may have been lawfully enjoyed. At the outset his possession was that of a tenant in common, not inconsistent with the title of the plaintiff, and, therefore, it lies upon him to show that his possession has assumed another character and has become inconsistent with the plaintiff's title. There being no article especially applicable to the case of tenants in common, article 144, which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. Now, as between tenants in common, mere non-participation of the profits by the one tenant and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession or consequently to make a case of adverse possession (*Watson and Co.* v. *Ramchund Dutt*, I. L. R., 18 C., 20). The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases, there must be something amounting to ouster of the person against whom adverse possession is claimed (*Culley* v. *Doe dem. Taylerson*, 11 A. & E., 1008). An ouster can be presumed to have taken place only when non-participation of the profits has lasted for a considerable time and other circumstances concur. In the present case, the actual enjoyment of all the holdings has been in the hands of tenants and not in those of the Nair, and in all the instances in which any question of limitation arises, it has been proved that the Zamorin took part in admitting the original tenant. There are two classes of cases which need consideration. There are the cases in which it appears that the present tenant represents the family a member of which at one time was admitted by the Zamorin and attorned to him. And there are the cases in which the present tenant is shown to have been admitted by the Nair on paying off the former tenant who had been admitted by the Zamorin. There is evidence in all these cases that the Nair intended the tenant who attorned to him to hold as his tenant to the exclusion

Kuthiravattath Nair v. Manavikkrama.

Kuthiravattath Nair v. Manavikkrama.

of any claim by the Zamorin, but it is not shown that the Zamorin had any notice of this attempted usurpation on the part of the Nair. In the first class of cases where the present occupant of the land can be identified in point of law with the tenant who was at one time admitted by the Zamorin, it is clear that the Zamorin has not lost his right of action against him, unless it appears that the tenancy has been determined. If the tenant were sued and relied upon article 142 of the Limitation Act, it would lie upon him to prove that the tenancy had been determined more than twelve years before the date of the suit. This would be so even if the holding of the tenant had been reduced to that of a tenant by sufferance (*Adimulam* v. *Pir Ravuthan*, I. L. R., 8 M., 424) and such a designation would certainly not be appropriate to tenants of the Zamorin who, whether or not there was a *kanom* were at any rate entitled to compensation for improvements before they could be ejected. The only possible way in which it could be suggested that the tenancy had been determined, would be by forfeiture consequent on the tenant's implied denial of the landlord's right. But the landlord is not bound to insist on a forfeiture when the occasion arises, and unless he elects to do so, the tenancy remains unaffected. A disobedience by the tenant, known to the landlord and accompanied by payment of rent to a third party, does not, at any rate as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy at will such conduct might afford evidence of the determination of the tenancy. (See *Doe dem. Graves* v. *Wells*, 10 A. & E., 435, where it appears that the dicta of Lord Redesdale in *Hovenden* v. *Annesley*, 2. Sch. and Left were not adopted). Here it is not even proved that the landlord was apprised of the tenant's conduct.

Holding with regard to the first class of cases that the tenancy is not proved to have been determined, I think, it follows that the Nair's possession was not adverse, for it was only by ousting the tenant or putting an end to the tenancy that the Nair could acquire adverse possession. In the other class of cases there is the circumstance that the present tenant is one who has been admitted by the Nair alone in supersession of the tenant who had attorned to the Zamorin. In these cases the original tenancy was lawfully determined and the present tenant has never attorned to the Zamorin. Nevertheless, I think it is impossible to hold that the

Zamorin has suffered anything in the nature of an ouster. If there had been no tenancy in common and the present tenant had simply taken over possession from the original tenant, there could be no question of adverse possession. The fact that the Nair took part in the transaction and took an acknowledgment from the new tenant cannot by itself alter the nature of the Nair's possession. The admission by the Nair of a new tenant was not *per se* inconsistent with the rights of his tenant in common. It is not necessary to consider the question which would arise if knowledge of the action of the Nair in concert with the tenants had been brought home to the Zamorin. No circumstances have been proved from which such knowledge could be inferred.

For these reasons, I think that the plea of limitation fails in both the abovementioned classes of cases.

Subrahmania Aiyar, J.—Of the several suits, referred to in support of the contention that the present claim is barred under section 43 of the Code of Civil Procedure, all, excepting the one which related to certain *devasvom* lands, are more or less similar in their character and may be considered together. Those suits were based on demises of some parcels of land out of the whole property held by the plaintiff, the Zamorin, and the defendant, the Nair, as co-owners. In them not only the tenants, who held under the demises and against whom part of the relief was claimed, were made defendants, but also the co-owner, and a division by metes and bounds of the parcels to which the demises related was sought. Though the frame of these suits is ambiguous, yet the suits, in so far as the co-owner was concerned, cannot but be treated as suits for partition of the parcels then in dispute. Now the question is whether the cause of action in any of those suits is identical with that in the present suit. It is impossible to doubt that the claim for partition in each of those suits was on the footing that the plaintiff was *entitled to a partition confined to the particular parcels comprised in the demises to the tenants* who were impleaded in each suit. This view of the Zamorin's right is of course wrong. But strangely enough, not only both the co-owners and their advisers, but even the Courts, that had to deal with the suits, continued up to at least 1877, to act as if a claim for such partial partition was sustainable in law. Unquestionably, the cause of action thus

Kuthirawattath Nair v. Manavikkrama.

relied on in each of those suits is different from that in the present suit since the latter is based upon a right, which unlike that alleged in the previous suits the Zamorin undoubtedly has, to a general and complete partition of the entire property held by him and the defendant. *Kakaji Ranoji* v. *Bapuji Madhavarav* (8 B., H. C. R., App. C. J. p. 205) is an authority in point, and *Ukkha* v. *Daga* (I.L.R., 7 B., 182) is distinguishable on the ground that there the *two* suits were on the *same right* which the plaintiff alleged gave him a title to a share of what had been left undivided at a private partial partition.

Next, as to the suit about the *devasvom* lands also, the conclusion must be the same. In it the plaintiff sought as one of the two trustees of the *devasvom* a partition of the lands forming the endowments of the institution. That was the right alleged though in law he had no such right. How then can that claim bar a suit in respect of the absolutely different right on which the present claim rests and which undoubtedly the plaintiff has? Clearly, therefore, it must be held that none of the suits relied on bars the present claim under S. 43.

As to the next point taken, *viz.*, limitation, the article applicable is clearly not 142 as was contended for the defendant, but 144. And the question is whether the defendant has held adverse possession for the statutory period in all or any of the cases in which the plea was urged. The facts material so far as that question is concerned are these. The plaintiff and the defendant are co-owners standing in the relation of tenants in common. Some parcels of land have been held by tenants who originally came into possession under demises or *kanom* mortgages granted by the predecessors of the plaintiff in respect of their undivided share or privies of those who so entered into possession or parties to whom the property was, at the instance of the defendant or his predecessors, subsequently handed over by the Zamorin's tenants. These persons attorned to the defendant's predecessors or the defendant himself and paid rent accordingly. From this the defendant contends that though he has not held direct and actual possession, yet the possession held through these tenants is sufficient to render the possession adverse as against the plaintiff. In dealing with a case such as this, some of the special rules governing the matter of adverse possession with reference to persons standing in the relation of landlord and tenant, of

Kuthira-vattath Nair v. Mana-vikkrama.

mortgagor and mortgagee and of tenants in common, have to be borne in mind. And what are these rules?

First, as to landlord and tenant.—Now a tenant's possession, unlike that of a stranger, is, in its inception, in subserviency to and consistent with the landlord's title, and as, during the existence of the tenancy, the tenant is bound to protect the interest of the landlord, the latter has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, "the statute does not begin to operate until the possession before consistent with the title of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner." (See 4 How. at *p.* 296 *Zellar's Lessee* v. *Eckhart*, cited in Angell on Limitation). It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place during the currency of a *definite* term, then the tenant's possession does not necessarily become adverse *immediately*. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the denial of his title, to determine the tenancy. In the absence of such act, the term subsists and the possession is, in law, possession under the lease. But the moment the term comes to its natural termination by efflux of time the disloyal tenant's possession becomes adverse. The Advocate-General in his argument went further. He contended that even after the expiry of the term the character of the possession remains unaltered so long as either the landlord or the tenant does not, by express notice to the other, put an end to the tenancy. Now, the expiry of the term by effluxion of time coupled with the continuing denial by the tenant that his holding was under the landlord's title, renders impossible the arising between the parties of even a tenancy by sufferance. What tenancy can there be then between the parties which requires to be put an end to by express notice? None. And it follows, as already stated, that the possession in such a case becomes

Kuthiravattath Nair v. Manavikkrama.

on the expiry of the term *ipso facto* absolutely wrongful—wrongful with respect to both the parties concerned. For that would indeed be an anomalous possession which, as to the rights of one party, was adverse, and as to the other fiduciary; and if as a consequence of a disclaimer with the knowledge of the landlord and the setting up of a title in himself, the tenant forfeits his possession as tenant and the other benefits incident to the character of a tenant, he ought to be entitled to the advantage which would result from his known adverse possession (see 3 Peters at page 43, *Willison* v. *Watkins,* cited in Angell on Limitation). And the same observations apply to the case of a tenant from year to year who denies his landlord's title. For such denial is in itself, as all the Judges pointed out in *Doe dem. Graves* v. *Wells,* evidence of the cessation of the tenancy (10 A. & E., at pages 435—7). And hence it is that in such a case the tenant is liable to be ejected without notice to quit. The contention of the Advocate-General is, therefore, opposed to principal and unsupported by authority. And the decisions in Indian cases on the point imply that the rule of law as to it is as stated above. If, instead of claiming title in himself, the tenant attorns and pays rent to or hands the property over to a third party who claims against the landlord, it follows, from what has been stated above, that the possession of the third party is adverse to the original owner provided the owner has knowledge of the facts; subject of course, if the tenancy be for a definite term, to the observations made above in dealing with the case of a tenant setting up title in himself.

Passing now to the case of mortgagor and mortgagee, mere denial by a mortgagee in possession or by the representative of the mortgagee in possession of the mortgagor's right to redeem is of itself not sufficient to convert such possession into adverse possession. *Mussad* v. *The Collector of Malabar* (I. L. R., 10 M., at p. 191). Now there can be no doubt that if the interest of the mortgagee alone is assailed by a third party, that of the mortgagor is not thereby affected. But where the mortgagor has made over possession of the mortgaged property to the mortgagee and while he is so out of actual possession, the former's interest is invaded, *Turner,* C. J., and *Muttusami Aiyar,* J., in *Ammu* v. *Ramakrishna Sastri,* treat such invasion as an *ouster* (I. L. R., 2 M., at page, 229). *Innes* and *Muttusami Aiyar,* J. J., however, in *Chathu* v. *Aku*

Kuthiravattath Nair v. Manavikkrama.

speak of the right to redeem as a mere *right of action*; though there are observations in the course of the same judgment which show that if the party claiming in antagonism to the mortgagor had taken and held possession of the mortgaged property itself for 12 years, such possession would bar the mortgagor as was held in *Ammu* v. *Ramakrishna Sastri* (I. L. R., 7 M., page 28; compare *Moidin* v. *Oothumanganni*, I. L. R., 11 M., 416). This last conclusion is in conflict with the opinion expressed by *Telang*, J., in *Chinto* v. *Janki*. The reason for that opinion is stated by the learned Judge thus: "The mortgagor, having once put the mortgagee in possession, ordinarily has no right to the possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession though, he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*" (I. L. R., 18 B., at page 58). And notwithstanding *Puttappa* v. *Timmaji* (I. L. R.; 14 B., p. 177), it would be seen from the later case of *Vinayak Janardan* v. *Mainai*, that the above opinion of *Telang*, J., commended itself as sound to *Sargent*, C. J., and *Candy*, J. (I. L. R., 19 B., at p. 138). In this state of the authorities, if I may express my own inclination, I would with deference say that *Justice Telang's* view appears to be the better view. If, however, that adopted in *Ammu* v. *Ramakrishna Sastri*, be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the mortgagor has notice of it, *Mussad* v. *The Collector of Malabar* (I. L. R., 10 M., at page 191).

Lastly as to the case of tenants in common.—The special characteristic of their right is united possession. Each has a present right to enter upon the whole land and upon every part of it and to occupy and enjoy the whole. And if one tenant in common occupied and took the whole profits, the other has, apart from statute, no remedy against the former whilst the tenancy in common continues unless he was put out of possession when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment, when an action of account would lie as against a bailiff of the owner of the entirety of an estate (*Henderson* v. *Eason*, 17 Q. B.,

Kuthiravattath Nair v. Manavikkrama.

at p. 718; see also *Watson and Co.* v. *Ramchund Dutt*, I. L. R., 18 C. 10; and *Lachmeswar Singh* v. *Manowar Hossein*, I. L. R., 19 C., 253). Consequently, sole occupation by one tenant in common is *primâ facie* not inconsistent with the right of any other tenant in common. And in such cases there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

Such being the rules applicable to a case like the present, how does the matter stand upon the facts here? It may be shortly observed that the possession relied on by the defendant amounts at the highest to nothing more than sole occupation by one of two tenants in common. In none of the instances, in which limitation is pleaded, express disclaimer of the co-owner's right and notice thereof to him are either alleged or established and the facts relied on as proof of adverse possession seem only to show what has been termed "silent possession." And when regard is had to the position of the parties, to the fact that the parcels of land as to which adverse possession is set up are so few compared with the large number of isolated parcels admitted to have been held jointly and to the nature of the demises under which the disputed parcels were or are held by the actual occupants thereof, it is impossible to come to the conclusion that what are relied on as supporting the contention in question constitute such open and notorious acts of exclusive ownership as, in law, are necessary to warrant the inference that one tenant in common has been ousted by the other. The plea of limitation must, therefore, be held to fail in all the instances in which it was urged.

I concur in the conclusion arrived at by my learned colleague.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Boddam.

Seshammal ... ... Plaintiff *

v.

Munisami Mudaliar ... ... Defendant.

Seshammal *v.* Munisami Mudaliar.

Hindu Law—Marriage—Sudras—Right or obligation to give in marriage—Suit for expenses.

Where a Sudra father had failed to give his daughter in marriage until after puberty and the mother gave her away and incurred expenses for the marriage which were found to be reasonable:

Held, that a suit by the mother against the father for the recovery of such expenses would not lie;

Held, also, that there was no legal obligation, but only a right and a religious duty to give in marriage.

Case stated under S. 617 of Act XIV of 1882 by the Chief Judge, Presidency Court of Small Causes, in S. C. No. 19335 of 1892.

In 1892, one Seshammal brought a suit against Munisami Mudaliar, her husband, to recover Rs. 310 from him in the following circumstances:—The plaintiff and her daughter had been living separately from the defendant for some years. The defendant wilfully refused to celebrate the marriage of Ammaniammal, their daughter, although she had attained puberty and was of marriageable age. The plaintiff had to celebrate the marriage and incurred an expense of Rs. 300, which with the interest, Rs. 10, she sought to recover from the defendant. The suit came on for hearing before the Chief Judge of the Small Cause Court, who gave a decree in favour of the plaintiff, holding that the father had neglected to perform the marriage of the girl and was therefore liable to recoup to the mother the expenses of the marriage, which he found were reasonable. Against this decision, an appeal was preferred to the Full Bench of the Small Cause Court for a retrial. The case coming on before Mr. *R. B. Michell,* Mr. *N. Subramaniem,* and Mr. *V. P. deRozario,* the two latter differing from Mr. *R. B. Michell,* held that there was no legal

* Referred Case No. 40 of 1896. 29th March 1897.

Seshammal v. Munisami Mudaliar.

obligation under the Hindu Law on the part of the father to give the daughter in marriage, that the texts laid down only a religious duty, and that the father's failure to give the girl in marriage did not amount to neglect. It was also held that, even if there was a legal obligation, the mother could not recover the expenses of the marriage under Ss. 69 and 70 of the Contract Act. They reversed the decision of *Mr. Michell* and dismissed the suit with costs. Upon a revision petition to the High Court by the plaintiff under S. 622 of the Civil Procedure Code, their Lordships the *Chief Justice* and *Mr. Justice Benson* held that a Full Bench of the S. C. Court had no right to pass their judgment as the Judges differed upon a question of Law and that they were bound to refer the points in difference to the High Court for its decision. In accordance with this decision, the Judges of the Small Cause Court referred the following questions to the High Court :—

(1) " Whether in the Mudaliar caste, to which the parties belong, when a daughter attains marriageable age, and the father neglects or refuses without sufficient reason to get her married and there is no kinsman willing to attend to the duty, it is the duty of the mother to have the marriage celebrated ?

(2) " Whether the duty of the father is merely a religious duty or a legal obligation ?

(3) Whether the duty of the mother is of the same nature as that of the father ?

(4) Whether, when the mother in the circumstances stated celebrates the marriage and incurs an expenditure found to be reasonable with regard to the position and means of the father, the mother is entitled to recover from him the amount expended ?"

T. V. Seshagiri Aiyar and *T. P. Kothandarama Aiyar* for plaintiff.

V. Krishnaswami Aiyar for defendant.

T. V. Seshagiri Aiyar.—The texts lay down the duty of the father to give the girl in marriage. In default of the father—and it is found that the father had neglected the duty—the texts of the Hindu Law cast upon the mother the obligation to give the girl in marriage. As the expenses of the marriage are found to be reasonable, my client is entitled to an answer in his favour upon the first question. In support of this view, I may refer to Vishnu,* Narada, and West and

* Vol. vii, ch. XXIV, 38—41, S. B. E. Series.

Buhler's Hindu Law, pages 754 and 822; Bannerjee's Hindu Law, page 52: and Norton's Leading Cases, page 1. I further contend that it is an enforceable legal obligation as against the father, because marriage expenses are a proper charge upon the estate, and even brothers in partition are bound to set apart money for the expenses of the marriages of their unmarried sisters. Further, a widow in possession of her husband's estate was entitled to charge the property for debts incurred by her for the marriage expenses of her daughter. I rely in support of this view on Mayne's Hindu Law, S. 587; Smriti Chandrika, pages 50, 51 and 52. The same duty is cast on the mother as on the father, and there is no difference in the nature of the obligation which rests upon the father and the mother. As the mother has spent the money for the expenses of the marriage, she is entitled under S. 70 of the Contract Act to recover the same from her husband. *Damodara Mudaliar* v. *Secretary of State for India*, I. L. R., 18 M., 88; *Bama Sundari Dasi* v. *Adhar Chunder Sarcar*, *Ib.* 22 C., 28; and *Rustom Singh* v. *Moti Singh*, *Ib.* 18 A., 474.

V. Krishnaswami Aiyar.—There is no finding of the Court that there was neglect. The question of neglect is not a mere question of fact, but involves a question of law, viz., whether the failure to give the girl in marriage when she was 14 years old would amount to neglect under the law. Among the Sudras, parties are at liberty to marry without any restriction as to age, and even *Mr. Michell* has said that the marriage should be performed soon after puberty; while among Brahmins it should be performed before puberty. The Hindu Law which was applicable to Brahmins in respect of marriage is not the law which should be applied to non-Brahmin castes, for their law mainly consisted of usages. It was laid down in Mandalik's Hindu Law, p. 433, and Bannerjee's Hindu Law, p. 245, that the Sudra castes were mainly governed in respect of marriages by customs and not by the texts of Hindu Law-givers. The question as to the marriageable age among Sudras must be considered as open, and in the reference it is assumed that there was a case of neglect. Your Lordships are, therefore, confined to the four questions referred which assume that there has been failure on the part of the father to give the girl in marriage in proper time. As regards the first question, it is only a religious duty in the case of the father, and it is even spoken of as a right. (*Vide* Norton's Leading Cases, page 1.) If it is a right, the forfeiture of that right cannot give rise to any obligation; and if it is an obligation, it involves a corresponding right in somebody else, and that somebody is the daughter. As the action is not brought by the daughter to enforce the obligation, the mother is not entitled to bring it, and the suit is not brought by the mother on behalf of the daughter, but on her

Seshammal v. Munisami Mudaliar.

own account. 4 M. H. C. R., 339, and the observations of the Privy Council in Calcutta Series, page 289, treat of the obligation as a purely moral one. If it is an obligation in the father according to the texts of Narada and Vishnu, it is an obligation on every one of the other persons named in order in the texts, in case of the default of the one preceding. Therefore, on the failure of the father to perform his legal obligation, a legal obligation is created in the other persons named in order of succession, to perform the marriage. If there is such legal obligation, the mother performed the marriage in virtue of that and, therefore, cannot sue the father for the payment of the marriage expenses. It is not a case of legal obligation in the father and of legal right in the mother. It is either a case of right in all in succession, in which case no action will lie for default, or obligation in all in which case the performance of the obligation by the mother will be a discharge of her own duty and will give rise to no action as against the husband. S. 69 or 70 of the Contract Act would give no right of action, as S. 69 pre-supposed that there was no duty on the part of the person spending, but only mere interest; and the duty rested on the person for whom the person interested paid some money. S. 70 could not apply, as it involved two propositions, viz., that the act was done for another and not by reason of any obligation which rested on the person doing the act, and that the other person for whom the act was done was in a position to accept or refuse the benefit sought to be conferred and did not express his refusal to take the benefit prior to the performance of the act. It was found in this case that the husband was not willing, and expressed his unwillingness to give the girl in marriage to the boy proposed, and therefore S. 70 could not apply.

The Court delivered the following

JUDGMENT:—The answer to the first question referred to us is that there is a right and a moral duty in the mother, but no legal obligation. The answer to the second question is that the duty of the father is a religious one and not a legal obligation. The third question is answered in the affirmative and the fourth in the negative.

We give no costs for this reference.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Subrahmania Aiyar ... ... Appellant* (*Defendant*)

v.

Panchanada Aiyar ... ... Respondent (*Plaintiff*).

Subrahmania Aiyar *v.* Panchanada Aiyar.

Rent Recovery Act (Madras Act VIII of 1865), S. 78—Limitation—Cause of action.

A distraint by a landlord was set aside by the Collector as illegal and the grain attached was ordered to be delivered back to the tenant. The tenant sued the landlord for damages for short delivery, alleging that the short fall had arisen owing to the negligence of the landlord in keeping the grain while under attachment, and for expenses incurred by him in getting the attachment removed. The suit was instituted more than six months from the date of the attachment but within six months from the date of the Collector's order.

Held: that the cause of action for the suit arose at the date of the attachment; and

that it was barred by limitation under S. 78 of the Rent Recovery Act.

Appeal from the remand order of the Subordinate Judge's Court of Tanjore, in A. S. No. 312 of 1897, presented against the decree of the District Munsif's Court of Kumbakonam in O. S. No. 571 of 1894.

Defendant as landlord distrained certain paddy, the property of plaintiff, his lessee, in view to sell it for arrears of rent. The Collector, finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. Defendant accordingly restored the paddy as it then was. Plaintiff alleging that the quantity restored was less than that attached and that the difference was caused by defendant not having taken proper care of the distrained property, instituted the suit more than six months from the date of distress but within six months from the date of the Collector's order, for the recovery of the deficient quantity of paddy or its price and costs incurred by him in the revenue proceedings. The Munsif dismissed the suit as being barred, but the Sub-Judge on appeal reversed the order of the Munsif and remanded it for disposal on the merits. The defendant then preferred this appeal to the High Court.

* A. A. O. No. 171 of 1897. 4th February 1896.

Subrahmania Aiyar v. Panchanada Aiyar.

V. Krishnaswami Aiyar and *P. Subbaiya Mudaliar* for appellant.

C. Sankara Nair for respondent.

The Court delivered the following

JUDGMENT:—The claim of the plaintiff was a claim for damages which arose in consequence of the wrongful distraint. The suit was not one as has been erroneously stated by the Subordinate Judge for the recovery of paddy that was undelivered, although it ought to have been delivered under the orders of the Head Assistant Collector. According to the plaint, there was no paddy in existence which was not delivered. The damages claimed by the plaintiff was on account of negligence on the part of the defendant in allowing the paddy to be wasted while it was in his custody. The cause of action did not therefore arise out of disobedience to the Head Assistant Collector's orders as held by the Subordinate Judge (assuming that such cause of action lay), but out of the legal distress itself. The negligence complained of was only an aggravation of the original wrong. See *Bhagirathi Panda* v. *Padala Gopaludu*, I. L. R., 3 M., 123. The same remark applies to the plaintiff's further claim for the costs incurred in obtaining the release of the property. The suit having been instituted more than six months after the date of the distraint, was clearly barred under S. 78 of the Rent Recovery Act. We must, therefore, reverse the order of the Subordinate Judge remanding the suit, and restore the decree of the District Munsif. The costs of the appellant must be paid by the respondent in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Veerasamy Chetty ... *Petitioner* * (Petitioner)

v.

Liladhara Vyass ... Respondent (*Counter-Petitioner*).

Veerasamy Chetty v. Liladhara Vyass.

Civil Procedure Code, Ss. 310-A and 315—Refund.

When a sale of immoveable property is set aside under S. 310-A, the auction purchaser who had paid the purchase money and interest is entitled to recover it from a decree-holder of the judgment-debtor who had attached the money in the hands of the Court and received it.

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* C. R. P. No. 93 of 1897. 10th December 1897.

Veerasamy Chetty v. Liladhara Vyass.

Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the order of the City Civil Court, Madras, in C. M. P. No. 573 of 1896 in the matter of E. P. No. 50 of 1893 in suit No. 4528 of 1892 on the file of the Court of Small Causes, Madras.

The auction-purchaser in execution of a decree of the Small Cause Court paid the sale proceeds into Court. The judgment-debtor applied to set aside the sale under S. 310-A, which was finally allowed on appeal. In the meantime, a decree-holder of the Small Cause Court against the same defendant had attached the money. The money was sent to the Small Cause Court and received by the attaching decree-holder. The auction-purchaser applied against him for repayment. The Small Cause Judge refused his application for refund under S. 622.

Sundaram Sastri, Kumarasami and Visvanathan for petitioner.

K. Lakshmana Chetti for respondent.

The Court delivered the following

JUDGMENT :—We think that the Judge has misunderstood the scope of S. 315 of the Code of Civil Procedure.

The fact that the purchase-money was handed over to the Small Cause Court under an attachment issued by that Court makes no difference. The person who paid the purchase-money is entitled under S. 315 to recover the same by way of execution from the person who has actually received it. The fact that the Small Cause Court was the medium through which the money reached the hands of the party proceeded against, cannot affect the rights or liabilities of the parties under S. 315.

We must, therefore, set aside the order of the Judge and direct that the petition be restored to his file and disposed of according to law. The petitioner must have his costs in both Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Venkayya ... ... Appellant * (*Petitioner*)

v.

Venkata Narasimhulu ... Respondent (*Counter-Petitioner*).

Venkayya *v.* Venkata Narasimhulu.

Guardian and Wards Act, S. 7—Hindu mother—Power to appoint guardian by will.

A Hindu mother is not entitled to appoint a guardian by will to her minor adopted son. In appointing a guardian to such a minor, the Court may take her wishes into consideration as to who may be so appointed.

Appeal from the order of the District Court of Ganjam on M. P. No. 362 of 1896.

M. K. Vaidyantha Aiyar and *C. R. Pattabhirama Aiyar* for appellant.

N. Subrahmaniem for respondent.

The Court delivered the following·

JUDGMENT:—Assuming that the will in this case is genuine (a question, however, which has not been tried), the appointment by it of a guardian cannot be held to be such an appointment as comes within S. 7, cl. 3 of the Guardian and Wards Act; for, a Hindu mother has no authority to make such appointment by will. It was, therefore, the duty of the Court to have enquired under S. 7, as to the necessity for appointing a guardian, and, if necessary, to have appointed a fit and proper person. In making such appointment, he might very properly take into consideration the wishes of the mother expressed in any genuine will.

We must, therefore, set aside the order of the District Judge and direct him to restore the petition to his file and to dispose of it according to law. Costs will abide and follow the result.

* A. A. O. No. 129 of 1897. 13th December 1897.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Visvalingam Pillai ... ... Appellant *(Plaintiff)*

v.

Palaniappa Chetty and others ... Respondents *(Defendants).*

Visvalingam Pillai *v* Palaniappa Chetty.

Mortgagor and mortgagee—Right of mortgagee to sue for mortgage money—Transfer of Property Act, Ss. 68 and 98—Right of mortgagee to sue for damages.

A mortgaged his property to B by a deed which ran as follows :—" Usufructuarily mortgaging to you the immoveable property . . . . . . The amount borrowed upon it is Rs. 500. . . . You shall for the said amount and for its interest enjoy the said properties for 3 faslies, *i.e.,* 1294 to 1296. . . . . . We shall thus redeem the land and house without paying to you the said principal, amount or interest and you shall immediately on the expiry of the said term re-deliver the said properties to us." Under this deed B was put in possession of the house alone and not of the land. In a suit against B for possession of the house after the 3 years by a purchaser at court auction of the right title and interest of A.

Held: that B was not entitled to retain the house and that he was bound to give it up after the expiry of the 3 years; and

that the only right of B was to sue A for damages for non-delivery of the whole of the mortgaged property.

Per Curium:—S. 68 of the Transfer of Property Act only comtemplates cases where the mortgagee is under the mortgage entitled to claim re-payment of the mortgage-money before redemption.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 481 of 1895, affirming the decree of the Court of the District Munsif of Tanjore in O. S. No. 521 of 1894.

The plaintiff as purchaser in court auction of the properties of the 1st defendant sued to recover possession of a house from the 2nd defendant who claimed to retain possession of it by virtue of a prior mortgage. The 2nd defendant's mortgage ran as follows :—

" Usufructuarily mortgaging to you the immoveable property . . . the amount borrowed upon it is Rs. 500 . . . . . You shall for the said amount and for its interest enjoy the said properties for 3 faslies, *i.e.,* 1294 to 1296 . . . . . We shall thus redeem the land and house without paying to you the said principal amount or interest and you shall immediately on the expiry of the said term re-deliver the said properties to us."

The 2nd defendant was put in possession of the house alone and not of the land and after the 3 years had realized but a part

* S. A. No. 47 of 1897. 9th September 1897.

Visvalingam Pillai v. Palaniappa Chetty.

of his debt. The plaintiff now sued to recover possession of the house. The 2nd defendant claimed to have a charge upon it for the rest of his debt or at least to retain possession of it until his debt was repaid in full. The Courts below dismissed the plaintiff's suit. The plaintiff then preferred this second appeal.

P. S. Sivaswami Aiyar for appellant.

C. Venkatasubbaramiah for *R. Shadagopa Chariar* for 2nd respondent.

The Court delivered the following

JUDGMENT :—On the whole, though not without hesitation, we think that the instrument may be considered to be a mortgage, but we are of opinion that it falls within S. 98 of the Transfer of Property Act and that the rights and liabilities of the parties must be determined by the contract itself. The contract does not provide for the contingency which has occurred. No special usage applicable to the present circumstances is set up. It is, however, contended that under S. 68 of the Transfer of Property Act it was open to the mortgagee to sue for the mortgage money as possession of part of the mortgaged property had not been delivered to him or to acquire a charge on the part which had been delivered to him until he was repaid the mortgage money. It appears to us, however, that S. 68 does not apply to a case like this. That section contemplates cases where the mortgagee is entitled to claim repayment of the mortgage money before redemption. In the present case however the contract gives no right to claim re-payment but in terms denies it. The only right the mortgagee had was to remain in possession for the stipulated period and to recover damages for the breach of contract by the mortgagor in not delivering possession of the whole of the land to him. We think, therefore, that the lower Courts were wrong in holding that exhibit I was an usufructuary mortgage and gave the 2nd defendant the right to remain in possession of the part he had after the expiry of the three years agreed upon.

We must, therefore, reverse the decrees in both the Courts below and decree possession of the property sued for to the plaintiff with Rs. 9 for past mesne profits and with future mesne profits also. The defendants must pay the plaintiff's costs throughout.

15

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Manakkal Bhattathiripad ... ... Appellant * (*1st Defendant*)

v.

Manakkal Damodaran ... ... Respondent (*Plaintiff*).

Manakkal Bhattathiripad *v.* Manakkal Damodaran.

Code of Civil Procedure, Ss. 244 and 311—Partial review, effect of—Irregularities in the execution of revised decree affecting parties to the original decree to be set aside in execution and not by separate suit.

A decree for sale of certain items of property was made against twelve defendants of whom the 12th defendant was in possession of item 6 of the properties ordered to be sold. Subsequently, the 11th defendant applied for a review and the Court passed a revised decree so far as he was concerned. The decree-holder then executed that portion of the original decree not affected by the review and in the course of that execution certain irregularities were committed which prejudiced the 12th defendant in the sale of item 6. In a suit by the 12th defendant for setting aside the sale on the ground of material irregularities:

Held, that the review did not nullify the old decree; but that it must be taken to have added certain amendments though the two decrees may be on separate pieces of paper; and

that, consequently, the matter was one which ought to be enquired into in execution under Ss. 244 and 311, Civil Procedure Code, and that no separate suit lay.

Appeal from the order of the District Court of South Malabar at Calicut, dated the 2nd day of October 1896, in A. S. No. 334 of 1896, presented against the decree of the Court of the District Munsif of Betutnad in O. S. No. 450 of 1895.

The plaintiff sued to set aside the sale of a paramba made in execution of the decree in O. S. 509 of 1892, on the file of the District Munsif's Court at Betutnad. He was the 12th defendant in the suit and was in possession of the paramba as mortgagee. The reason assigned for setting aside the sale was that that there was a great deal of irregularity in the conduct of the sale and that thereby he was seriously prejudiced. The Munsif held that the suit was barred by S. 244, Civil Procedure Code. On appeal, the District Judge reversed the decree of the Munsif holding that the 11th defendant had applied for a review of the original decree which was accordingly reviewed, that the revised decree which in his opinion

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* A. A. O. No. 26 of 1897. 21st January 1898.

Manakkal Bhattathiripad v. Manakkal Damodaran.

nullified the original decree did not incorporate the provisions of the original decree and that, consequently, the sale which took place in accordance with the original decree was not had in execution of an existing decree. He, accordingly, decided that the suit was maintainable and remanded the suit to be tried on the merits. The defendants then preferred this second appeal.

P. R. Sundara Aiyar for appellant.

K. R. Subrahmania Sastri for respondent.

The Court delivered the following

JUDGMENT :—The ground upon which the Judge seems to have based his conclusion was that there was no decree in execution of which the sale had taken place, for the Judge seems to have held that the original decree of the 10th March 1893 had been entirely superseded or cancelled on review, and was, therefore, a mere nullity. The application for review was made only by the 11th defendant and was not directed against the whole decree but only against that part of it which affected the 11th defendant. The judgment on review treats the original decree as existing and final in all other respects than that in which it directs a modification. So that the Judge was clearly in error in treating the original decree as a mere nullity. There is no doubt but that there should be only one decree in a suit, and though here the original and the revised decrees are written on separate papers, they must be taken together and read as one. In this view, it cannot be said that the appellant here was executing a decree not in existence as it is still urged before us that he was. It is undisputable that there was an executable decree in existence between the parties and any misdescription of the terms of that decree in the application for execution should have been set right in execution and any objection to the sale founded on such misdescription was also a matter for disposal in execution under S. 244, Code of Civil Procedure. A separate suit like this is prohibited by that section. On this ground, we must allow the appeal, and setting aside the order of the District Judge, we restore the decree of the District Munsif dismissing the suit with costs. The respondents must pay the appellant's costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Benson.

Muniappan Chetty and others ... ... Appellants* (*Defendants* 5—8)

v.

Mannarkat Muppil Nair and another ... Respondents (*Plaintiffs*).

Malabar land tenure—Grant of cowle by Government, effect of—Jenmi's right how far affected by grant of cowle.

Muniappan Chetty *v.* Mannarkat Muppil Nair.

The grant of a cowle by Government in jenmi lands is only to insure a favorable assessment of Government dues on cultivation. It does not in any way affect the jenmi's right in the land. But the holder of the cowle must settle his terms with the jenmi at the same time that he receives the cowle from Government. If he fail to do so, he is liable to be evicted by the jenmi. Should, however, he be left in possession for more than twelve years without any recognition of the jenmi's right, he would like any other trespasser acquire a valid tittle by prescription against the jenmi.

Secretary of State v. *Astamurti*, I. L. R., 13 M., 118, referred to.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat in A. S. No. 189 of 1895, affirming the decree of the Court of the District Munsif of Nedunganad in O. S. No. 366 of 1892.

The facts necessary for the purpose of this report appear sufficiently from the judgment of the Court.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*), *C. R. Pattabhirama Aiyar* and *K. R. Subrahmania Sastri* for appellants.

C. Sankara Nair for 1st respondent.

V. Ryru Nambiar for respondents.

The Court delivered the following

JUDGMENT:—In this case it has been found that the jenmi title to the plaint land was in the plaintiffs, and that in 1863, one Koru obtained from Government a cowle to cultivate the land, and that he and his assignees, defendants 5 to 8, have been in possession ever since. It was alleged that Koru originally got possession of the land under an oral lease from the 1st plaintiff in 1861-62, but the Subordinate Judge did not decide the question holding that even if Koru took possession of the land on the strength of the

* Second appeal No. 1203 of 1896. 19th January 1898.

Muniappan Chetty v. Mannarkat Muppil Nair.

Government cowle without reference to the jenmi, such possession must be regarded as not hostile to the jenmi who was, therefore, entitled to recover at any time on the strength of his title. The Subordinate Judge, therefore, decreed that plaintiffs should recover possession on payment of compensation for improvements.

Against this decree the defendants 5 to 8 appeal on the ground that the plaintiff's suit is barred by limitation. We have no doubt but that this is so, unless the letting to Koru in 1861-62, alleged by the plaintiffs is proved. The effect of the grant of a cowle *quoad* the jenmi has often formed the subject of judicial decision (Wigram's Malabar Law and Custom, 137), and is well laid down in the case of the *Secretary of State* v. *Astamurti*, I. L. R., 13 M., 118. It is expressly provided in the cowle that the jenmi's rights are not affected by the grant of the cowle, and it is usual for the holder of the cowle to settle with the jenmi at the same time when he receives the cowle from Government. The cowle merely insures a favorable assessment of the Government dues on cultivation. Should the holder of the cowle fail to settle with the jenmi, he may be evicted. Should he, however, be left in possession for more than twelve years without any recognition of the jenmi right, he would like any other trespasser acquire a valid title by prescription.

In the present case, there was no recognition of the 1st plaintiff's right as jenmi. The learned pleader for the respondents contends that Exhibits 18 and 19 only convey Koru's right to improvement, and that this fact, together with the attornment by Koru to the 12th defendant as jenmi in 1880, indicate that Koru did not claim the land *as owner*, and argues that, unless he claimed to hold the land as owner, the plaintiff's right could not become barred. He relies on a passage in *Siva Subrahmania* v. *Secretary of State for India* to the effect that possession will not generate a prescriptive right, unless it is possession with the intention to hold exclusively and as owner (I. L. R., 9 M., 302-3). This argument is untenable. The language must be understood in the light of the facts and arguments in that case, and when so understood, it has no reference to the present case. There the question was, whether certain acts were evidence of an ownership, or merely of an easement? In the present case there is no question of easement at all. Moreover, there is nothing in Exhibits 18 or 19 or 1 to indicate that Koru at

any time recognized the 1st plaintiff as jenmi. Exhibits 18 and 19 are as consistent with Koru's recognition of rival jenmi (the 12th defendant) as with his recognition of the plaintiff, and Exhibit I, by recognizing the latter, affords ground for supposing that Koru if he meant to recognize any jenmi meant to recognize the 12th defendant rather than the 1st plaintiff. The 1st plaintiff, then, was out of possession and Koru was in possession for more than twelve years without any recognition of 1st plaintiff's right, and the plaintiff's right is, therefore, barred under Art. 142 of Sch. 2 of the Limitation Act (S. A. No. 785 of 1894, unreported), unless, as already stated, Koru's possession was that of a tenant under the oral letting alleged by the plaintiff.

Muniappan Chetty v. Mannarkat Muppil Nair.

We must, therefore, ask the Subordinate Judge to return a finding on this issue, on the evidence on record, within six weeks of the date of receipt of this order. Seven days will be allowed for filing objection after the finding has been posted upon this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Nellaiyappa Pillai ... ... Appellant* (*Plaintiff*)

v.

Thangama Nachiyar and others ... Respondents (*Defendants*).

Nellaiyappa Pillai v. Thangama Nachiyar.

Civil Procedure Code, S. 539—Powers of trustee appointed by Committee under Act XX, 1863—Appointment of new trustee—Misappropriation of trust funds.

A general trustee of a temple appointed by the Devastanom Committee under Act XX of 1863, is entitled to resort to the ordinary courts to obtain all appropriate reliefs for the protection of the interests of the temple without having recourse to the special procedure prescribed by S. 539, Civil Procedure Code.

Jeyangarulavaru v. *Sri Hati Durma Dossji*, 4. M. H. C. R. 4 followed.

The plaintiff was the general trustee of a temple appointed by the Committee under Act XX of 1863. The defendants were the representatives in interest of a sub-trustee of a certain endowment or Kattalai in the temple. The sub-trustee had misappropriated the funds of the endowment and died without recouping the endowment. The plaintiff then instituted a suit in the Court of a Subordinate Judge against the defendants for the recovery of the funds misappropriated and for the appointment of a new trustee for the Kattalai:

Held, that the suit was maintainable as it was found in the Sub-Court; and that S. 539, Civil Procedure Code, was no bar.

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* A. A. O. No. 139 of 1897. 14th December 1897.

Nellaiyappa Pillai. v. Thangama Nachiyar.

Per curiam:— S. 539, Civil Procedure Code, is intended to apply to persons who before its enactment had, or were believed to have, no right to take proceedings for the purposes mentioned in the section, and in their case the limitation requiring previous sanction for the suit was one that was necessary to prevent an abuse of the powers conferred.

Appeal from the order of the Subordinate Judge's Court of Tinnevelly in O. S. No. 33 of 1896.

The defendant's ancestor was the trustee of a certain endowment or kattalai in the temple of Tondarkal Nainarkovil at Tinnevelly. He had misappropriated the funds of the endowment and died without re-couping the same. The plaintiff, who was the trustee of the temple appointed by the Committee under Act XX of 1863, sued the defendants for the recovery of the funds misappropraited, and for the appointment of a new trustee. Along with the plaint a petition under S. 30 was presented by the plaintiff for permission thereunder, and it was granted and likewise a notice under it was ordered. The suit was instituted in the Subordinate Judge's Court at Tinnevelly and the Sub-Judge held that the suit was not maintainable in his Court and that the proper course for the plaintiff was to take the procedure prescribed by S. 539, Civil Procedure Code. The plaintiff then preferred this appeal.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *M. R. Ramakrishna Aiyar* for appellant.

P. R. Sundara Aiyar and *K. Srinivasa Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—In our opinion, the Subordinate Judge has overlooked the circumstance that the plaintiff in this case was the general trustee of the temple and as such held a special position in regard to the protection of its interests. In that character, it was not only his right but his duty to see that the temple funds in the hands of special trustees were duly appropriated (*Jeyangarulavaru* v. *Sri Hati Durma Dossji*, 4 M. H. C. R. at p. 4). And even before the enactment in 1877 of the provision now embodied in S. 539, Civil Procedure Code, he would have been entitled to resort to the ordinary courts to enforce the obligations of the special trustees and to obtain all appropriate relief for the protection of the interests of the temple. He would have been entitled to

Nellaiyappa Pillai v. Thangama Nachiyar.

have sued for the removal of such trustees for malversation, and if there was no other provision for filling up the vacancy, he could have asked the Court to appoint fresh trustees. We do not think that such right was intended to be affected by S. 539, Civil Procedure Code. If that section were held to apply to the case of a person in the position of the present plaintiff, the rights which he had prior to the enactment would be seriously restricted, inasmuch as the exercise of his rights would be made dependant on the sanction of the Advocate-General or Collector as the case might be. It is difficult to believe that special rights of the character in question were intended to be so restricted. We agree with the learned Advocate-General that the suit was intended to apply to persons who before its enactment had, or were believed to have, no right to take proceedings for the purposes mentioned in the section, and in their case the limitation requiring previous sanction for the suit was one that was necessary to prevent an abuse of the powers conferred.

We have not thought it necessary to refer to the decision of the High Courts in other parts of India as they proceed on a view which has not been accepted by the Full Bench decision of this Court reported in *Rangasami Naickan* v. *Varadappa Naickan*, I. L. R., 17 M. 465.

Our view is in accordance with the principal in *Srinivasa Ayyangar* v. *Srinivasa Swami*, I. L. R., 16 M. 31, and the unreported cases therein cited.

We, therefore, set aside the order of the Sub-Judge and direct that the plaint be received by him and that the suit be then disposed of in accordance with law. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Ramanathan Chetti ... ... Appellant* *(Plaintiff)*

v.

Pulikutti Servai and others ... ... Respondents *(Defendants 1 to 38).*

Ejectment suit—Relation of decree to date of plaint—Suit by lessor during continuance of lease—Possession during lease.

Ramanathan Chetti v. Pulikutti Servai,

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* A. No. 161 of 1896. 3rd February 1898.

Ramanathan Chetti v. Pulikutti Servai.

A granted a lease of his melvaram right in an inam village to B for two faslies (1304 and 1305). C ousted the lessee from possession claiming a right in himself for the same. A then instituted a suit against B and C in ejectment during the continuance of the term of the lease. Pending the suit the lease expired. The plaint contained no prayer for a declaration of A's right.

Held, that in every suit, the decree only settles the rights of the parties at the date of the plaint;

that as at the date of the plaint A was not entitled to possession, his suit was pre-mature and unsustainable; and

that no declaration can be given to A of his right, inasmuch as he had not prayed for the same in the plaint.

Appeal from the decree of the Sub-Court of Madura (East) in O. S. No. 40 of 1895.

The facts of the case appear sufficiently from the judgment of the Court.

V. Krishnaswami Aiyar and *K. Srinivasa Aiyangar* for appellant.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *P. R. Sundara Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The property in dispute in this case consists of 12 pangus or shares in an inam village. The lands appertaining to the shares are in the occupancy of raiyats who own the kudivaram right. The shareholders or inamdars are the melwaramdars, and, as such, are entitled to take their share of the crops and enjoy the other incidents appertaining to the tenure. Admittedly, the plaintiff's vendor had before the sale to the plaintiff granted a lease of the shares in dispute to the late 1st defendant for Faslies 1304 and 1305. The present suit was instituted before the expiration of the term of the said lease and while it remained in force. The plaintiff claimed a decree for possession of the shares against the contesting defendants, who, it was alleged, had ousted the 1st defendant, the lessee. On behalf of the defendants, it was objected that the plaintiff's suit as framed was unsustainable, the lease being treated in the plaint itself as subsisting and valid. The Subordinate Judge overruled the objection. But we cannot agree with him as he has overlooked the elementary rule that a plaintiff who seeks possession must show that at the date of the suit, he

was entitled to such relief (Cole on Ejectment, p. 66). The observations of *Sir Barnes Peacock* in *Davis* v. *Kazee Abdool Hamed*, 8 W. R., p. 58, are a direct authority that in this country also a landlord in the position of the plaintiff could not sue to eject even a trespasser so long as the lease is outstanding. The case of *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdry*, I. L. R., 10 C., 1076, cited by the Subordinate Judge does not lay down a rule to the contrary, and if it did, the decision could not be held to be sound. As we understand that case, the Court there only held that as the plaintiff had been deprived of the joint possession he had held with his nim-howladars, he was entitled to be restored to such possession. Clause *n.* of S. 108 of the Transfer of Property Act on which also the Subordinate Judge relies, no doubt imposes an obligation on the lessor to put the lessee in possession. But that provision certainly cannot be construed as affecting the rule of procedure that a plaintiff suing for possession must shew that at the date of the suit he was entitled to that relief.

On behalf of the plaintiff, it was urged here that, even if at the date of the suit, the plaintiff's claim for possession was unsustainable, still as the term of the lease expired during the pendency of the litigation, the plaintiff might now be given a decree for possession, should his case be shown to be well founded on the merits. The cases *Sakharam Mahadev Dange* v. *Harikishna Dange*, I. L. R., 6 B. 113, and *Sangili* v. *Mookan*, I. L. R., 16 M., 350, on which the learned pleader for the plaintiff laid stress in support of the above contention do not warrant the course suggested by him being adopted in cases like the present. If, in suits for partition under the Hindu Law, events occurring after the commencement of the action are to be considered in determining the rights of the parties, such cases must be treated as an exception to the general rule that the rights of parties must be ascertained as at the date of the action brought (Compare the observations of *Collins, J.*, in *Reys* v. *London Assurance Corporation*, 1897, 2, Q. B. D. 142). It seems to be clear, therefore, that the plaintiff's suit for possession was not maintainable in consequence of the existence then of the outstanding term under the lease to the late 1st defendant.

It was next urged for the plaintiff that the dispossession of the 1st defendant was on a claim of title which was inconsistent with

Ramanathan Chetti v. Pulikutti Servai.

the plaintiff's right to the reversion and such relief as would protect that right might and ought to be given in this suit. The relief appropriate in such circumstances would be a declaration (*Per Peacock,* C. J., in 10 W. R. at p. 19 C. R.)

But, as the plaint was framed upon an erroneous view of the plaintiff's rights, no declaration was prayed for with reference to the view of the matter just stated. And the case is not one in which the plaintiff should be allowed to amend at this stage of the litigation, especially because, even after such an amendment the case cannot be decided in favor of the plaintiff without taking further evidence as to whether Exhibit C, which is the very first link in the chain of the plaintiff's title was executed by the parties who are alleged to have executed it, but which evidence the plaintiff had failed to call without, so far as appears, any proper reasons for such omission.

In these circumstances, there is no alternative left but to dismiss the suit on the preliminary ground stated above.

The appeal, therefore, fails and is disallowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.,* Chief Justice, and Mr. Justice Shephard.

Ramasami Aiyar and another. ... Appellants * (1*st* and 2*nd Defendants*)

v.

Annasami Aiyar and others .... Respondents (*Plaintiffs*).

Ramasami Aiyar v. Annasami Aiyar.

Specific Relief Act, S 42—Further relief—Injunction where sole possession available —Person in joint possession—Suit for sole possession or for mere declaration.

A person who is in joint possession of a temple and its properties with others who claim to be joint trustees with him must, in order to exclude them from the management, sue for sole possession and not for a mere declaration that he is the proper trustee and the others not. The addition in the plaint of a further prayer for an injunction against the others is not either an appropriate or a sufficient further relief so as to save his suit from the bar created by S. 42 of the Specific Relief Act.

Appeal from the decree of the District Court of Trichinopoly in O. S. No. 15 of 1895.

* A. No. 135 of 1895. 10th March 1898.

Ramasami Aiyar v. Annasami Aiyar.

This was suit for a declaration that the plaintiffs and not the defendants are the trustees and managers of the Saptarishi Iswara temple, Lalgudi, and for a perpetual injunction that the defendants shall not interfere with the plaintiffs in the management thereof. The plaintiffs and defendants had all been originally appointed trustees of the temple by the Devastanom Committee, but, on the 19th February 1893, the Committee had for some reasons dismissed the defendants from the trusteeship and directed them to hand over to the plaintiffs, possession of the temple jewels and other properties which they were holding as trustees. The defendant refused to obey the order of the Committee and contended that they had not been validly dismissed from office. The plaintiffs then brought this present suit for a declaration and injunction to which the defendants set up the bar of S. 42, Specific Relief Act. The District Judge held that the suit was maintainable as it was framed and, on the merits, decreed the plaintiff's claim. The defendants then preferred this appeal.

C. Sankara Nayar and *N. Narayana Aiyangar* for appellants.

N. Subrahmanyam for respondents.

C. R. Pattabhirama Aiyar and *T. Rangachariar* for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT:—Objection is taken to the frame of the suit on the ground that the appellants are still in possession of the jewels and other temple property. Indeed an admission was made to that effect in the Court below (see paragraph 26 of the judgment). It is said on the respondents' behalf that although the appellants are in possession the respondents are also in possession as trustees. This may be so; though it is not admitted, but it is none the less true that the respondents are entitled to further relief than a mere declaration of title. It follows, having regard to the provision of the Specific Relief Act, S. 42, that the suit for a declaration cannot lie. It is further argued, that the plaint can be sustained in so far as it asks for an injunction. But, in our opinion, an injunction is not the appropriate remedy. The respondents really want more than an injunction, they want the positive relief which a decree in ejectment gives. It would be futile to give the repondents a merely prohibitory injunction which is all that they ask for,

Ramasami Aiyar v. Annasami Aiyar.

for the result would be to leave unsettled the real question at issue between the parties. Moreover, to grant to plaintiffs in the position of the respondents relief such as is asked for in this suit would be to allow them to obtain by a side wind the declaration which the law says they are not entitled to have. The decree goes further than the plaint by directing the delivery up of all the temple property to the plaintiffs, showing clearly that, in the opinion of the Court, it was all in the possession of the defendants. It is to be regretted that the issue was not framed in such a way as to bring out the real question which had to be tried. We must reverse the decree and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Ramasamaiyan and others ... ... *Appellants* * *(Defendants 1, 3 and 4)*.

v.

Virasami Aiyar ... ... *Respondent (Plaintiff)*.

Ramasami Aiyan v. Virasami Aiyar.

Hindu Law—Mitakshara—Mortgage—Decree against the father—Son's liablity—Son's right to impeach the decree—Transfer of Property Act, S. 85.

A mortgage decree-holder purchased in execution of his decree against a Hindu father. The sons deny that any debt was due and contend that they are not bound by a decree to which they were not parties.

1. *Held*, by *Shephard*, J. (*Davies*, J., dubitante) that the sons' shares would be bound even though they were not made parties to the suit.)

Bhawani Prasad v. *Kallu*, I. L. R., 17 A., 537, commented on.

2. As mortgagee had no notice of the son's existence, the sale bound the son's interest as well.

3. *Held*, also, that as it was open to the sons to *have tried* the fact of immorality or illegality of a debt, so it was likewise open to them to *try* the existence of the debt itself.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 141 of 1896, reversing the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 379 of 1894.

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* S. A. No. 1435 of 1896. 10th March 1898.

(1) See upon the first point judgment of *Turner*, C. J., in *Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R., 9 M., 343 at p. 351, and upon the third point *Natasayyan* v. *Ponnusami*, I. L. R., 16 M., 99.

Ramasami Aiyan v. Virasami Aiyar.

The facts of the case appear sufficiently from the judgment of the Court.

V. Krisnaswami Aiyar and *R. A. Krishnaswami Aiyar* for appellants.

C. R. Pattabhirama Aiyar and *K. Balamukumda Aiyar* for respondent.

The Court delivered the following

JUDGMENTS :—*Shephard, J.*—The parties to this appeal are on the one hand the infant son of a judgment-debtor, named Ramaiyan, and on the other the judgment-creditors of the same person who in execution of their decree purchased the property previously held by them under an hypothecation. The District Munsif dismissed the suit, without hearing any evidence, on the ground that the plaint disclosed no cause of action. The District Judge on appeal reversed this decree and granted a decree in the plaintiff's favour, holding that the plaintiff's original interest in the property had been in no way affected by the sale thereof, because the plaintiff had not been joined with his father aad brother in the suit which led up to the sale. The District Judge bases his judgment on the ruling of the Full Bench of the Allahabad High Court in *Bhawani Prasad* v. *Kallu,* I. L. R., 17 A., 537. In that case, the plaint was similar to the plaint now before us in that it did not allege that the debt incurred by the father was incurred for immoral or impious purposes. The plaintiff then relied, as the plaintiff-respondent does here, on the fact that he was no party to the mortgage decree obtained against his father. The judgment of the majority of the Court in that case, like the argument in the present case, proceeded entirely upon the ground that the law has been altered by the enactment of S. 85 of the Transfer of Property Act which directs that "all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage, provided that the plaintiff has notice of such interest." Independently of the statute the position of a purchaser who in a sale in execution of a decree against the father bought the entirety of the estate is the same as regards the son whether the decree was a mortgage decree or a decree for money. In either case all that the son can claim is that, not having been a party to the sale or the proceedings which led

Ramasami Aiyan *v.* Virasami Aiyar.

up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale (*Mussamut Nanomi* v. *Modun Mohun*, L. R., 13, I. A., 9; *Kunhali Beari* v. *Keshava Shanbaga*, I. L. R., 11 M., 76).

The theory is that as the father may in order to pay a just debt legally sell the whole estate without suit, so his creditor may bring about such sale by the intervention of a suit. It is not necessary that the son shall be called in whether the sale is voluntary or procured by a proceeding in *invitum*, and there is no object in joining him except to preclude him from afterwards questioning the nature of the debt. According to the decision in *Bhawani Prasad's* case, a distinction must be made between a voluntary and an enforced sale, when such sale is the consequence of a mortgage suit, and in this latter case it must be held that no interest passes except that of those who are made parties to the suit, and this distinction is insisted upon, because the legislature has enacted as a written rule of law what was previously a well-recognized rule of procedure. Having regard to the theory above stated, I cannot think that this effect should be given to the section. The section is certainly imperative in its terms. Expressed in any other mood it would be vain. But a sanction is not wanting, for inconvenient consequences may follow on a neglect of the law. The mortgagee who omits to join persons interested in the property may have his suit dismissed, or, if he obtains a decree, may find, notwithstanding, that he has to institute or defend another suit. Nevertheless as against the Hindu father the decree which is passed in the absence of his sons is a good and valid decree. The creditor, although he may have failed to obey the rule contained in the section, has got the decree which he requires as a foundation for his application to sell the whole estate. In the Allahabad Court this proposition would be denied. In effect it must be said that the decree though valid against the father has, since the Act was passed, lost the peculiar quality which it previously possessed. It can no longer be made the means of compelling the father to sell the estate. This seems to me a conclusion which is wholly unwarranted by the terms of the section. I agree with *Mr. Justice Bannerji* in the reasons which he has given for dissenting from the rest of the Court. In addition I would only refer to the proviso appended to the section. The effect of the proviso is that, unless the mortgagee has notice of the existence of the son, he is not

affected by the section, and, therefore, presumably the decree which he obtains and the subsequent proceedings therein are not vitiated by the omission to join the son. It follows that the extent of the interest obtained by the purchaser may depend on the knowledge or want of knowledge of the mortgagee at the time of the institution of the suit.

I think we ought to be slow to adopt a construction which would lead to this anomaly as well as the other anomalies dwelt upon by *Mr. Justice Bannerji.*

For these reasons, I would reverse the decree of the District Judge; but, inasmuch as the plaint in effect alleges that there really was no debt owing by the father, I think the respondent is entitled to have that question tried. It is argued on behalf of the appellant that the only question which the son of a Hindu debtor can raise is as to the nature of the debt, and that he cannot question the existence of a debt which forms the foundation of a decree against his father. According to this contention, it would be open to the father by confessing judgment to procure by indirect means the sale of the entire estate when he could not lawfully alienate it by a voluntary conveyance. The limitation which is imposed by Hindu law on the father's power of alienation would become illusory.

But this is clearly not the law. Whether the sale is a voluntary or an enforced sale, its validity depends upon the existence of a just debt in satisfaction of which the sale is effected. If authority is needed, the dictum in L. R., 13 I. A., p. 18, may be cited as showing that the son may question alike the existence and the nature of the debt in consequence of which the sale has taken place.

The decrees of both Courts must be reversed and the suit must be remanded for retrial by the District Munsif. It must be understood that no questions have been decided in this appeal save those two questions which arise upon the allegations made in the plaint. The respondents must pay the costs of this appeal. Other costs will be provided for in the revised decree.

Davies, J.—I agree to the reversal of the lower appellate Court's decree, because there was no allegation in the plaint and

Ramasami Aiyan v. Virasami Aiyar.

nothing to show that the mortgagees who brought the suit wherein the sale was decreed had notice of the plaintiff's interest. Their omission, therefore, to make the plaintiff also a party to that suit did not *ipso facto* entitle the plaintiff to a decree, for in the Allahabad case the ruling in which the Judge has followed, and with which I cannot say that I disagree, the fact was there had been such notice. I also agree to the reversal of the decree of the Court of First Instance and to the order of remand which my learned colleague has directed in the case, because there can be no doubt that the plaintiff's suit lies to show, as is alleged in the plaint, that there was no consideration for the mortgage, or in other words the non-existence of the debt by which it is sought to bind the plaintiff's share in the family property.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Subramanyam Chetty and others ... Appellants * (*Defts.* 1 *to* 3)

v.

Thayaramma ... . Respondent (*Plaintiff*).

Subramanyam Chetty v. Thayaramma

Hindu law—Stridhanam—Husband's brother's daughter preferential heir to maternal uncle's son.

In the absence of nearer heirs, the stridhanam of a Hindu woman married in one of the approved forms of marriage devolves on her death on her husband's brother's daughter in preference to her maternal uncle's son.

Per curiam :—The brother's daughter of a Hindu is his bandhu.

Appeal from the decree of *Boddam*, J., in O. S. No. 149 of 1897 in the High Court of Judicature at Madras in its exercise of its ordinary original jurisdiction.

The facts of the case appear sufficiently from the judgment of the Court.

P. R. Sundara Aiyar for 1st and 2nd appellants.

T. Ethiraja Mudaliar for appellants.

C. R. Pattabhirama Aiyar and *M. Venkatramiah Chetti* for respondent.

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* O. S. Appeal No. 50 of 1897. 14th March 1898.

Subramanyam Chetty v. Thayaramma

The Court delivered the following

JUDGMENT:—The dispute in this case is as to the right of succession to the stridhanam of one Rengammal, who had been married according to one of the approved forms, but who died without issue, male or female, her husband having pre-deceased her. The learned Judge holds that the plaintiffs—the daughters of Rengammal's husband's brother—are, in the absence of nearer heirs, entitled to take the succession.

In the argument before us, two contentions were urged on behalf of the appellants, defendants 1 to 3, *viz.*: 1st, that the plaintiffs are, under the law, not in the line of heirs at all; 2ndly, that if they are, the 2nd defendant (assuming he is, as alleged by him, Rengammal's maternal uncle's adopted son) has a preferential right to the property in dispute.

With reference to the first of these contentions, the question is whether the plaintiffs are in the line of heirs to their uncle, since, in the admitted circumstances of the case, the heirs entitled to take Rengammal's stridhanam would, under the Mitakshara, be her husband's heirs. Now, undoubtedly, the plaintiffs are sapindas of their uncle, in the Mitakshara sense of the term 'sapinda,' inasmuch as they have community with him of particles of the same body as explained in the Acharakanda of the Mitakshara. And as persons liable to be transferred by marriage to a gotra other than that of their birth, they (plaintiffs) must be looked upon as sapindas of a different gotra, and would, therefore, be their uncle's *bandhus*, unless, as was argued on behalf of the appellants, they were precluded from claiming such heritable right in consequence of their sex. But such an argument it is too late in this Presidency to raise, it being opposed to the *ratio decidendi* of several decisions in this Court, beginning with *Radhakrishna* v. *Kuttiammal* (8 M. H. C. R., 88), decided more than twenty years ago, and which recognized the right of a sister to inherit to her brother's estate. No doubt, in that case, her right was not in terms stated to be that of a *bandhu;* but not being a *sagotra* sapinda or *samanodhaka*, she could have been let in only as a *bandhu*; and that it was in that right her claim was admitted has been repeatedly pointed out. See *Lakshmanammal* v. *Tiruvengada* (I. L. R., 5 M. at p. 250); *Mari* v. *Chinnammal* (*Ib.* 8 M. at p. 130); *Nallanna* v. *Ponnal* (*Ib.* 14 M. at p. 150); and *Balamma* v. *Pullayya* (*Ib.* 18 M. at p. 170).

Subramanyam Chetty v. Tharayamma

Following the decision upholding the sister's right, that of other *female* relations to succeed as bandhus has also been recognised. See *Nallana* v. *Ponnal*, already cited, and *Ramappudayan* v. *Arumukathudayan* (I. L. R., 17 M. 182). It may also be added that in *Chinnammal* v. *Venkatachala* (*Ib.* 15 M. at p. 422) a man's father's sister was expressly referred to by the learned Judges who decided the case as a *bandhu.* Great stress was laid on behalf of the appellants upon the language used in *Sundrammal* v. *Rengasami Mudaliar* (I. L. R., 18 M. at pp. 198 and 199) with reference to a sister's daughter's right to come in as a *bandhu.* But we must take those observations as intended to draw a distinction between the less preferential right of female bandhus and that of the more favored male bandhus, or 'regular bandhus' as they were otherwise spoken of by the learned Judges (*Ib.* 198). We ought not, we think, to understand those observations as intended to deny that female sapindas in general do come within the definition of bandhus under the Mitakshara, especially when we consider that the same learned Judges had not only in *Nallanna* v. *Ponnal* in unequivocal terms decided that a man's son's daughter is a bandhu, but also subsequent to *Sundrammal* v. *Rengasami Mudali*, pointed out that *Kuttiammal* v. *Radhakrishna* proceeded "on the view that any relative who is also a cognate may be treated as coming within the definition of *bhinnagotra sapinda*, and that the term *sapinda*, as used in ch. 2, sec. 6 of the Mitakshara included females" (I. L. R., 18 M. at p. 170). We must, therefore, hold that the plaintiffs are not precluded from claiming as bandhus of their uncle by reason of their sex, and that, consequently, they are in the line of heirs to the deceased Rengammal's stridhanam.

The only other contention urged on behalf of the appellants is shortly disposed of. It rests entirely upon a misconception as to the import of a text of Brihaspati, referred to in the concluding part of sec. 622 of Mayne's Hindu Law, 5th Edition. The learned author, no doubt, mentions among others a woman's maternal uncle's son as one of the persons entitled, according to Brihaspati, to claim her stridhanam. But that the whole explanation of the text given by Mr. Mayne is erroneous will be evident from a careful examination of the text itself. It runs as follows :—" The sister of a mother, the wife of a maternal or of a paternal uncle, the sister of a father, the mother of a wife, and the wife of an elder brother are declared equal to a mother. If they leave no male

issue of their body, nor the son of a daughter, nor a daughter, the sister's son and the rest shall inherit their property." (Guru Dass Bannerjee's "Marriage and Stridhanam," 2nd Edition, page 387.) The meaning of the text, borrowing the language of Dr. Bannerjee, is as follows :—To a male, the females related as the sister of his mother, the wife of his maternal or of his paternal uncle, the sister of his father, the mother of his wife and the wife of his elder brother are like his mother ; so, as to a female, the males related in the *reciprocal* way as her sister's son, her husband's sister's son, her husband's brother's son, her brother's son, her daughter's husband and her husband's younger brother are like her son. And these last-mentioned relations of a female being like her sons inherit her stridhana if she leave no male issue, nor son of a daughter, nor a daughter." (*Ib.* 388 and 389.)

Subramanyam Chetty v. Thayaramma

The second defendant, assuming that he is Rengammal's maternal uncle's adopted son, is not a relation specified in the text, and, consequently, he cannot under it set up any right as against the plaintiffs. It is unnecessary, therefore, to consider and express any opinion on the question much discussed in the argument whether the passages in the Smriti Chandrika and other southern commentaries which refer to, and rely on, the text, are to be accepted as modifying the rule laid down by the Mitakshara with reference to the devolution of the stridhanam of a woman married in one of the approved forms, but dying without issue.

The decision of the learned Judge is right. The appeal fails, and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Thiruvengadasami Mudaliar ... Appellant* (*Plaintiff*)

v.

Raghavachary ... Respondent (*Defendant*).

Rule of Practice, Original Side, High Court—Commissioner's certificate of account—Powers of appellate court to interfere with the commissioner's certificate.

Thiruvengadasami Mudaliar v. Raghavachary.

Where a commissioner is appointed in a suit to look into and settle the accounts of the parties and he issues a certificate and the presiding Judge agrees with it, it is unreasonable that an appellate court should go into particulars in the accounts in

* O. S. appeal No. 61 of 1897. 15th March 1898.

Thiruvengadasami Mudaliar v. Raghavachary.

regard to which both the judge and the commissioner had come to the same conclusion. The Rule of Practice No. 292 on the original side that "a certificate or report of an officer of the court or commissioner, unless discharged or varied, will be taken as conclusive evidence of the facts found therein" is sound and reasonable.

Appeal from the decree of the High Court of Judicature at Madras in the exercise of its ordinary original civil jurisdiction, made in C. S. No. 38 of 1894.

The facts necessary for the purpose of this report appear sufficiently from the judgment of the Court.

P. R. Sundara Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The appellant's vakil wishes to argue against the correctness of various items in the account which was referred to the commissioner for report. A preliminary objection is taken that it is not open to the appellant's vakil to do this as the learned Judge did not vary the report of the commissioner, and No. 292 of the Rules of Practice on the original side provides that "a certificate or report of an officer of the court or commissioner, unless discharged or varied will be taken as conclusive evidence of the facts found therein." The rule was interpreted by this Court in the sense contended for by the respondent's vakil in O. S. appeal No. 8 of 1896, and it appears to us to be unreasonable that the appellate court should go into particulars in an account in regard to which both the commissioner and the Judge have come to the same conclusion. We, therefore, follow the decision in that case. There is, however, one term in regard to which the commissioner did not give a decision, but referred it to the Court for determination, that is, whether the plaintiff drew a sum of Rs. 1,070 for his own use as alleged by the defendant. In regard to this, the appellant's vakil has addressed us on the evidence, but we do not think that there is any ground for differing from the conclusion of the learned Judge. Though the abstract accounts were carelessly kept, this does not appear to be so in regard to the day book and the payment shown therein. The Judge accepted that account as correct, and we see no reason to take a contrary view. The result is that the appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Chidambaram Chettiar ... ... { Appellant* (*Petitioner, Plaintiff*)

v.

Rama Row and others ... ... { Respondents (*Counter-petitioner, Defendants*).

Chidambaram Chettiar *v.* Rama Row.

Civil Procedure Code, S. 310 (*a*)—Right of prior mortgagee to be paid out of sale proceeds—Prior mortgagee not decree-holder—Decree, construction of.

A mortgagee sued his mortgagor and others who had prior charge on the property for his debt and obtained a decree which directed that the mortgaged property be sold and out of the sale proceeds the prior charges be first paid and then the mortgage debt of the plaintiff. The mortgage debt amounted to a sum of Rs. 8,127. The property was sold and purchased by the plaintiff himself for Rs. 1,379 which he paid into Court. Immediately after, the holder of one of the prior charges who was also a subsequent mortgagee paid the decree amount and 5 per cent. on the purchase money in court and had the sale set aside under S. 310 (*a*). The plaintiff thereupon applied for the refund of his purchase money.

Held: that he was entitled to a refund of the whole sum without any deduction being made on account of the prior charges, inasmuch as these charges had according to the decree to be paid out of the sale proceeds alone and there were no sale proceeds, the sale itself having been set aside.

Appeal from the order of the District Court of Coimbatore, in C. M. P., Nos. 11 and 18 of 1897 in execution petition No. 44 of 1896, connected with O. S. No. 14 of 1895.

The following judgment of the District Judge gives a clear and concise statement of the facts:—

"Plaintiff sued upon a mortgage bond executed by first defendant. Second defendant who is a subsequent mortgagee of part of the hypotheca and third and fourth defendants who are subsequent purchasers of part, proved that they had cleared off mortgages which were prior to the mortgage executed by 1st defendant and, therefore, the Court allowed to second, third and fourth defendants a prior charge.

The decree was the usual decree under the Transfer of Property Act that 1st defendant within six months pay Rs. 6,937-8-0 or else that the property be sold, but the decree went on to direct that the sale proceeds go to clear off the prior charges of second, third, and fourth defendants before any payment to plaintiff.

* A. A. O. No. 151 of 1897. 28th January 1898.

Chidambaram Chettiar v. Rama Row.

The first defendant did not pay the money and the property was brought to sale. Plaintiff was permitted to bid and he purchased all the lands except No. 658 for Rs. 1,379. No. 658 was purchased by a stranger for Rs. 1,340; on the total Rs. 2,719 the poundages was Rs. 69-1-0. Plaintiff paid into Court Rs. 1,309-15-0, being the amount of his purchase money less the poundage.

Meanwhile second defendant had filed a suit in a District Munsif's Court on his subequent mortgage, had obtained a decree and had brought to sale and purchased his hypotheca, subject to the prior mortgage held by plaintiff. Thus the second defendant instead of being a subsequent mortgagee became a subsequent purchaser. This being so the second defendant paid into Court Rs. 8,263-11-0 under S. 310 (*a*) and got the sale set aside.

This Rs. 8,263-11-0 was composed of Rs. 136, being five per cent. on the purchase money and Rs. 8,127-11-0, being the amount specified in the proclamation for sale.

Plaintiff now asks for the refund of his purchase money Rs. 1,309-16-0 with Rs. 69 at five per cent. on that sum and also for the whole sum of Rs. 8,127-11-0 as his decree amount. Second defendant opposes this and asks that this prior charge be cleared off before the decree-amount is paid to plaintiff. To this, plaintiff replies that the sale has been set aside and that this money is not sale proceeds.

My decision is that plaintiff may of course get back his purchase money which he paid into Court with five per cent. and that the other purchaser is entitled to his five per cent. and to the refund of his purchase money if he has paid it into Court. But the Rs. 8,127-11-0 must undoubtedly go to clear off the charges in the rank set forth in the decree and plaintiff can get no part of this Rs. 8,127-11-0 until the prior charges of second, third and fourth defendants as set fourth in the decree have been satisfied. Cheques may be issued accordingly."

V. Krishnaswami Aiyar for appellant.

V. Sankaranarayana Sastri for respondents.

The Court delivered the following

JUDGMENT:—The 2nd, 3rd, and 4th defendants were entitled to payment of the amounts adjudged to them only out of the sale proceeds. There were no sale proceeds in this case inasmuch as the sale was set aside under the provisions of S. 310 (*a*) of the Code of Civil Procedure by payment, so far as this case is concerned,

of the amount due to the decree-holder, the appellant, who was, therefore, entitled to the whole of that amount. We cannot accept the contention that the 2nd, 3rd, and 4th defendants were also decree-holders. It is true the decree recognizes certain charges in their favour, but they could obtain no orders in execution on account of those charges until there were sale proceeds available for distribution according to the decree. They have, therefore, never become decree-holders. We, accordingly, set aside the order of the Judge, and hold that the appellant is entitled to the whole of the sum of Rs. 8,127-11-0; and if any portion thereof has been paid to respondents (defendants 2, 3 or 4), we direct that the same be refunded to the appellant with interest at the rate of 6 per cent. per annum from date of receipt to date of repayment. The respondents must pay the plaintiffs' (appellants') costs in this and in the lower Courts.

Chidambaram Chettiar v. Rama Row.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Ittappan ... ... Appellant* in both cases (*Plaintiff*)

v.

Parangadan Nair and others ... Respondents (*Defendants*).

Suit in ejectment not allowed where defendant is in a position to enforce specific performance of agreement to execute kanom—Transfer of Property Act, S. 54—Oral agreement with possession—Kanom for more than 100 rupees.

Ittappan v. Parangadan Nair.

The plaintiff sued to eject the defendant, his tenant. The defendant admitted the plaintiff's title, but set up a contract under which the plaintiff had agreed to grant a kanom to the defendant and had taken from him Rs. 405, the kanom amount. The contract had been entered into in 1892 and the suit in ejectment was brought in 1893.

Held: that as the defendant's right to enforce specific performance of the contract was alive and not barred by limitation, the plaintiff's suit ought to be dismissed as being in fraud of his own agreement.

Dictum in *Pappi Reddi* v. *Narasa Reddi*, I. L. R., 16 M., 464, doubted.

Begam v. *Muhammad Yakub*, I. L. R., 16 A., 344, and S. A. 730 of 1894, followed.

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* S. A. No. 1646 of 1896. 22nd March 1898.

Ittappan v. Parangadan Nair.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 238 of 1895, presented against the decrees of the Court of the District Munsif of Nedunganad in O. S. No. 456 of 1893.

This was a suit to recover arrears of rent and for ejectment of the defendants from the plaint lands. The plaintiff sued upon a particular base under which the defendants were to surrender after a certain time on payment of compensation. The defendants denied the case set up but admitted the plaintiff's title and set up a contract between themselves and the plaintiff under which the latter took a renewal fee of Rs. 405 for granting a kanom to the defendants. The plaintiff denied these allegations altogether. The renewal fee was alleged to have been paid in 1892 and the suit was brought in 1893. The District Munsif found the case set up by the plaintiff to be false and the contract set up by the defendant to be true. But he held that, inasmuch as there was no registered instrument granting the kanom to the defendants, the contract alone cannot avail them and decreed the suit. On appeal the District Judge, while agreeing with the Munsif on the case and the contract set up, dismissed the suit of the plaintiff who then preferred this second appeal.

P. R. Sundara Aiyar for appellant.

C. Krishnan for 1st respondent.

V. Ryru Nambiar for 29th respondent.

The Court delivered the following

JUDGMENT:—It is argued for the appellant that the whole of the renewal fees were not paid by the defendants. That, however, was not plaintiff's case in the Court of First Instance, nor is it a ground of appeal to this Court. The contention of the plaintiff was simply that the money paid was not paid as renewal fee, but as rent. The Courts found that it was paid as renewal fee. No question was raised as to whether the payment was the full fee or only a part of it, and we cannot allow the plaintiff's present contention that it was only part of the fee to be maintained. We find that the full fee was paid. Then it is argued that a lease of the kind agreed upon between the parties can only be made by a registered instrument, and that as no such instrument was executed in this case, the plaintiff can maintain the present suit in

Ittappan v. Parangadan Nair.

ejectment. In support of this plea, reliance is placed on a dictum in the case of *Pappi Reddi* v. *Narasa Reddi* (I. L. R., 16 M., 464). That dictum has been doubted by the full Bench of the Allahabad High Court (*Begam* v. *Muhammad Yakub*, I. L. R., 16 A., 344) and by a Divisional Bench of this Court (S. A. 730 of 1894). We must also say that we find difficulty in accepting it as correct, although as pointed out by *Edge*, C. J., the decision could be supported on the ground that in that case the defendant has unsuccessfully brought a suit for specific performance and had in it set up a contract which differed from the actual contract. In the present case the plaintiff brought his suit for ejectment before the expiration of the time within which the defendants might have sued for specific performance of the contract to renew the lease. In such a case to allow the plaintiff to eject the lessee would, in our opinion, be to give the plaintiff a decree in fraud of his contract of lease. We, therefore, agree with the lower appellate Court that the plaintiff's suit was premature, and we dismiss this second appeal No. 1646 of 1896 with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.*

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

In appeal No. 66 of 1896.

Mahabala Bhatta and another ... Appellants (*Plaintiffs*).
Kunhanna Banta and others ... Respondents (*Defendants*).

In appeal No. 42 of 1897.

Mahabala Bhatta and another .... Appellants (*Plaintiffs*).
Subbanna Bhatta and others ... Respondents (*Defendants*).

In appeal No. 173 of 1897.

Subbanna Bhatta and another ... Appellants (*Defendants* 1 & 7).

In appeal No. 174 of 1897.

Naraina Bhatta and others ... Appellants (*Defendants* 2 *to* 6 & 8).

Mahabala Bhatta and another ... Respondents in both the appeals Nos. 173 & 174 of 1897 (*Plaintiffs*).

Mahabal Bhatta v. Kunhanna Banta.

Tenants in common, suit by—Non-joinder, effect of—Civil Procedure Code, S. 31—Torts—Joinder of parties.

One tenant-in-common can sue a trespasser in tort without making the other tenants parties and get relief so far as he is concerned.

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* Appeals Nos. 66 of 1896 and 42, 173 and 174 of 1897. 28th February 1898.

Mahabala Bhatta v. Kunhanna Banta.

The plaintiff and S. B. were both entitled as tenants-in-common to the mortgagee's interest under a usufructuary mortgage deed in the rates of two-thirds and one-third of it respectively. The 2nd and 3rd defendants who were the mortgagors were in possession under a rental agreement and the mortgage deed stood in the name of the 1st defendant benami for the plaintiff. On the 1st defendant denying the plaintiff's title to the mortgage, the plaintiff instituted a suit for a declaration that he was the owner of the mortgage.

Held: that the plaintiff was entitled to a declaration so far as his two-thirds share in the mortgage was concerned without making S. B. party to the suit.

Obitur: In the case of property indivisible one co-owner alone can recover it from a person who holds unlawful possession of it.

The law as to the effect of non-joinder in English well as in Indian Courts discussed.

Appeals from the decrees of the Subordinate Judge's Court of South Canara in O. S. Nos. 28, 29 and 34 of 1894.

The facts of the cases appear sufficiently from the judgments of the Court.

In appeal 66 of 1896.

R. A. Nelson for appellants.

C. R. Pattabhirama Aiyar for 18th respondent.

In appeal 42 of 1897.

K. Narayana Rau for appellants.

C. R. Pattabhirama Aiyar for 9th respondent.

P. R. Sundara Aiyar for 2nd to 6th and 8th respondents.

K. P. Madhava Rau for 1st and 7th respondents.

In appeal 173 of 1897.

K. P. Madhava Rau for appellants.

K. Narayana Rau for 1st respondent.

In appeal 174 of 1897.

P. R. Sundara Aiyar for appellants.

K. Narayana Rau for 1st respondent.

The Court delivered the following

JUDGMENTS.—The material allegations for the plaintiffs were briefly, that their father Ramiah Bhatta obtained *benami* in the

Mahabala Bhatta v. Kunhanna Banta.

first defendant's name the usufructuary mortgage deed bearing date the 25th April 1884 for Rs. 4,700 due to him by the 2nd and 3rd defendants, that these defendants were, however, permitted to retain possession of the lands (mortgaged by them) as lessees under the lease granted to them at the time the mortgage was executed, that subsequent to the plaintiffs' father's death, which took place in 1887, the 1st defendant, about September 1889, denied the right of the plaintiffs under the mortgage and that he fraudulently obtained possession of the mortgage instrument and certain other documents from Kambar Subbanna Bhatta, the plaintiffs' maternal uncle, to whom the documents had been entrusted pending certain disputes between the plaintiffs and their brother Subbanna Bhatta respecting the division of their property.

The plaintiffs asked for a declaration that the mortgage belonged to their father and prayed for the recovery of the instrument of mortgage and the other documents referred to and for their share of certain rents collected from, or payable by, the 2nd and 3rd defendants under the lease.

The 2nd and 3rd defendants admitted the title set up by the plaintiffs. But the 1st defendant denied that he was a mere *benamidar*, and averred that having paid the money himself he was the real mortgagee. He also contended that the suit was unsustainable, since the plaintiffs' brother Subbanna Bhatta had not joined in it, and since the plaintiffs, though out of possession of the lands under mortgage, had omitted to claim possession thereof as they were bound to do under section 42 of the Specific Relief Act. The defendant further urged that the suit was barred by limitation.

The Subordinate Judge dismissed the suit, having arrived at findings against the plaintiffs with reference to the questions of *benami*, nonjoinder and limitation. But, in our opinion, the findings as to *benami*, and non-joinder are wrong, and that as to limitation partly so. Having come to this conclusion, it will be convenient, first, to deal with the case on the merits, and then to discuss the points of law raised.

The *onus* of showing that the transaction was *benami* was, no doubt, on the plaintiffs. But taking the evidence adduced in this suit and in the connected suits which were tried with it by consent

Mahabala Bhatta v. Kunhanna Banta.

of the parties, we have no doubt that the weight of evidence is decidedly in favour of the view that the case of the plaintiffs is true.

[Here their Lordships discuss the evidence on the question of benami.]

We now pass to the points of law urged.

First, as to the objection of non-joinder which was strongly pressed.—Now the present action is one founded on *tort;* and as the plaintiffs and their brother Subbanna Bhatta had become divided, their interest under the mortgage is not joint but *separate* being that of tenants in common. The tenants in common may, in such an action as the present, at their option either join or sever seems to be clear law (Dicey on Parties. Rule 80, paragraph 2). No doubt, according to the common law practice, when one tenant in common sued on a tort without joining other tenants in common as plaintiffs, objection on the score of non-joinder was allowed to be taken by way of a plea in abatement. If, however, such plea was not raised, he was entitled to proceed in the action. But then, if the subject-matter of the claim was divisible, he could get his share and no more. Compare the opinion of the majority in *Doe d Hellyer* v. *King,* 6. Exch. Reports 791, though the dissenting Judge *Platt,* B., went further in that case and held that a tenant in common is owner of the whole estate in common with his co-tenants, and therefore, as soon as he has proved his right to the possession in common with others and that the defendant having no such right is a wrong-doer, as against such wrong-doer he, the plaintiff, is entitled to recover possession of the whole (Ib. 795). However this may be, there is no doubt that in the case of property *indivisible* one co-owner alone can recover it from a person that holds unlawful possession thereof. In *Broadbent* v. *Ledward,* a member of a club who was as such proprietor of certain pictures jointly with other members who were not made co-plaintiffs in the action recovered the pictures from one who had no right at all (11 Ad. and Ell. 209). *Lord Denman,* C. J., observed: "It is always unpleasant to defeat justice by adherence to technical and arbitrary rules. In suing upon contracts the rule has certainly been that all the contracting parties must be joined as co-plaintiffs, and advantage may be taken of the non-joinder without a plea in abatement; but,

Mahâbâla Bhatta v. Kunhanna Banta.

as no express authority has been shown by Mr. Wightman for the application of this rule to the action of detinue, we shall decide against the defendant. If any inconvenient consequence arises to the defendant from detaining the property of joint owners, it might have been avoided by giving it up to any one of them." *Patteson*, J., said: "The rule as to the consequence of the non-joinder of parties as plaintiffs in actions founded upon contract is not satisfactory in principle, and ought not to be extended." *Williams* and *Coleridge*, JJ., concurred. The principal of these decisions is still applicable and it is clear that one tenant in common can sue in tort without joining others—see *Roberts* v. *Holland* (1893, I. Q. B., 665) cited for the plaintiffs.

It was contended, however, that the equity practice is different and ought to be followed in this country. It is no doubt true that the general rule in Chancery is that all persons interested should be parties, and that under the old practice it was open to a defendant to take objection on the ground of non-joinder of a tenant in common by way of demurrer (*Brookes* v. *Burt.*—1. Beav 106). But that rule is not since the abolition of demurrers for want of parties too inflexible to admit of qualifications. In *Wright* v. *Robotham* (33 Ch. Dn. p. 106) it was no doubt held by the Court of Appeal that one of two persons who had equal right to certain title-deeds could not recover them without the concurrence of the other. But there the defendant's possession was not unlawful, as *Cotton* and *Lindley*, L., JJ., took care to point out, implying thereby that their decision might have been different had the possession of the defendant been unlawful. Even in such a case the Court directed the deeds to be deposited in Court, the plaintiffs having liberty to inspect and make copies of them. And in *Foster* v. *Crabb*, (21. L. J. C. P., p. 189), cited in *Wright* v. *Robotham*, the decision of the Court of Common Pleas rests on the ground that the plaintiff did not shew a better right than the defendant to the possession of the deed, the title to which was ambulatory between those who have an interest in and may have occasion to use it and each is entitled to keep the deed from the other so long as he actually retains it in his custody and control, but no longer. We see, therefore, that either at law or in equity since the passing of the new rules of the Supreme Court, whereby pleas in abatement and demurrer for want of parties were abolished, the remedy available

Mahabala Bhatta v. Kunhanna Banta.

when there is a defect of parties is, as pointed out by Jessel M. R., in *Werderman v. Societe Generale D'Electricite* (19 Ch. Dn. 246), that provided by order XVI, rule 13, which empowers Courts to strike out or add parties so that the person who objects because of want of parties has nothing to do but to take out summons asking that certain parties be added as necessary parties (Ib. 251). It is necessary to observe that the above case was decided when the order corresponding to section 31 of the present Code of Civil Procedure did not contain the word "non-joinder." Notwithstanding the absence of these words the Court treated the order as comprehending cases of "non-joinder" as well as "misjoinder." Turning now to section 31 of our Code which corresponds to order XVI, rule 13, as it stood at the time of the decision in 19 Chancery Division, and before it was amended by the addition of the word "non-joinder," we think a similar construction ought to be put on it and the section must be held to amount to a direction to the Court not to dismiss a suit on the ground of non-joinder. The reason for such a provision is obvious. The rule as to parties is for the purposes of justice and the Court has ample powers under section 32, Code of Civil Procedure, to add parties whenever they ought to have been made parties or whenever without them the Court could not deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In the present case what the plaintiffs are entitled to in point of law is a declaration of their title to two-thirds of the mortgage debt. Their right is separate from that of Subbanna Bhatta who is entitled to the remaining one-third though the debt is the same. In these circumstances Subbanna Bhatta is not an indispensable party whom the Court will insist upon being brought before it, for he will not be directly affected by any decree in this suit; nor, in our opinion, is he a necessary party, that is, though not likely to be affected directly by the decree, he is yet one who, as interested in the actual controversy, should be before the Court to enable it to adjudicate fully and finally as between the parties already before it. If he is made a co-plaintiff, no doubt, future litigation in the matter can be altogether prevented. But that can only be if he consents to be a co-plaintiff, which does not appear to be the case. If, however, he be made a co-defendant, it is difficult to see how that could stop further litigation. If the plaintiffs succeeded,

Mahabala Bhatta v. Kunhanna Bhanta.

they could get relief only in respect of their shares, and Subbanna Bhatta would be at liberty to sue in respect of his share. But if the plaintiff fail upon the question of *benami*, it is doubtful whether the decision would be *res judicata* between the 1st defendant and the co-defendant Subbanna Bhatta (see *Nabin Chandra* v. *Mucta Sundari*, 7 B. L. R., appx. p. 38; but *contra*, *Chandu* v. *Kunhamed*, I. L. R., 14 M. 324). Even were this view wrong the 1st defendant might have moved the Court, if Subbanna Bhatta consented to be a co-plaintiff, to add him as such, and, if he did not, to make him a defendant. The omission to adopt this course could not for a moment be held to warrant a dismissal of the suit which has been fully tried and dealt with on the merits. Even at the present stage of the case we should and would have directed Subbanna Bhatta to be made a party if that would really serve the ends of justice. But as shewn already, we do not think it necessary that he should be brought on the record. He was himself one of the witnesses in the case and nothing was elicited from him to shew that he raised any question affecting in the remotest degree the right of the plaintiffs to obtain the reliefs claimed by them. The contention that the suit fails on the ground of non-joinder of Subbanna Bhatta must, therefore, be overruled.

The objection under section 42 of the Specific Relief Act also fails, as the evidence leaves no doubt that the 2nd and 3rd defendants have for several years before the suit withheld payment of rent and refused to attorn to the 1st defendant who cannot thus be taken to be in possession through them.

As to limitation, the claim as to declaration is not barred, as there is no evidence to shew that there was any denial of the title of the plaintiffs before September 1889. Nor has that for the documents been shown to be out of time. But the claim for the rents received by the 1st defendant is barred.

As to the 2nd and 3rd defendants, their liability for rent under the lease cannot of course be gone into in this suit.

In reversal of the decree of the Subordinate Judge, there will be a decree for the plaintiffs declaring their two-thirds right under the mortgage of the 25th April 1884 and the leases, dated 25th April 1884 and 22nd October 1885, and for possession of those documents and those mentioned in the schedule annexed to the plaint. The

Mahabala Bhatta v. Kunhanna Banta.

rest of the claim is dismissed. The 1st defendant will pay the plaintiffs' costs throughout. The other defendants will bear their own.

IN APPEAL No. 42 OF 1897.

The real question in this case is as to what interest, if any, the plaintiffs' father possessed under the usufructuary mortgages of the 22nd May 1880 and 9th June 1884 executed to his brother-in-law K. Subbanna Bhatta, the 1st defendant, by Mahomed Beari, the 10th defendant. Exhibit A in the present suit which, for reasons given in our judgment in appeal No. 66 of 1896, we find to be a genuine document, is decisive of the matter, and according to it half out of the first named mortgage belonged to plaintiffs' father and out of Rs. 1,738-4-0, the amount of the second mortgage, Rs. 313-12-0 alone belonged to K. Subbanna and the remainder belonged to the plaintiffs' father, the mortgages and the leases connected therewith being taken in the name of the former, for the benefit of the latter also. In reversal of the lower Court's decree there will be a decree declaring that the plaintiffs are entitled to two-thirds of half of the mortgage under date the 22nd May 1880, and to two-thirds of the mortgage under date the 9th June 1884, after deduction of the sum of Rs. 313-12-0 from the mortgage amount and the same with regard to the leases connected therewith.

The plaintiffs are not entitled to the custody of the documents in preference to the 1st defendant and those claiming through him and who also possess an interest under those documents.

The question of the 10th defendant's liability for rent cannot be gone into in this suit.

The 1st defendant will pay the plaintiffs' costs throughout. The other parties will bear their own.

IN APPEALS NOS. 173 AND 174 OF 1897.

We see no reason to disturb the decision of the lower Court. The appeals are dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Narayana Kaviroyan ... ... Appellant* (*Defendant*)

v.

Kandasami Goundan ... ... Respondent (*Plaintiff*)

Civil Procedure Code, Ss. 13 and 43—Transfer of Property Act, S. 55—Suit for specific performance of contract to sell—Fresh suit for possession barred.

Narayana Kaviroyan *v.* Kandasami Goundan.

In the absence of a provision in the contract to the contrary a person suing for the specific performance of a contract to sell land must also ask for possession in the same suit, otherwise a fresh suit for possession will be barred under Ss. 13 and 43 of the Civil Procedure Code.

Nathu Valad Pandu v. *Budhu Valad Bhika*, I. L. R. 18 B., 537, distinguished.

Second appeal from the decree of the District Judge of Coimbatore in A. S. No. 5 of 1896 reversing the decree of the District Munsif of Erode in O. S. No. 632 of 1894.

Plaintiff obtained a decree in O. S. No. 142 of 1893 directing the defendant to execute a sale deed for Rs. 200 in respect of his lands in favor of plaintiff. Defendant having failed to give a sale deed accordingly, plaintiff got one executed by the Munsif's Court on behalf of the defendant, and even after its execution, defendant failed to deliver the lands to plaintiff though demanded. Hence this suit to recover the lands with mesne profits.

The defendant contended that the suit was barred under S. 43, Civil Procedure Code. The Munsif upheld the defendant's contention and dismissing the plaintiff's suit delivered the following judgment:—

"Plaintiff was in a position to sue for possession of the lands when he filed suit No. 142 of 1893. Instead of asking for possession also, he confined himself there to a prayer for the execution of a sale deed for the lands agreed to be sold by defendant. Having thus omitted to sue for possession there, I do not think he has the right to ask for it in a separate suit now as S. 43, C. P. C., is against law. I do not think the form of the sale deed A given to plaintiff by this Court can improve matters even a bit. The suit consequently fails and with it the claim for damages (See *Shib Kristo Dah* v. *Abdool Sobhan Chowdhry*, 15 W. R., 409). The result is the suit is dismissed with costs."

* S. A. No. 779 of 1897. 2nd May 1898.

Narayana Kaviroyan v. Kandasami Goundan.

The plaintiff then appealed to the District Court and the District Judge reversed the Munsif's decree for the following reasons.—

"I am of opinion that this appeal must be allowed. I doubt if plaintiff could sue for possession upon a contract to sell. I think that all the relief he could claim was the execution of a conveyance. But even if plaintiff could have sued for possession, he need not do so. The Transfer of Property Act regards the transfer of ownership as complete when the document is registered and it is not contemplated that a man will retain possession after he has executed a conveyance. Defendant is a trespasser upon plaintiff's land. *Nathu Valad Pandu* v. *Bhudu Valad Bhika*, I. L. R., 18 B., 537." The defendant then preferred this second appeal to the High Court.

T. Venkatasubba Aiyar for appellant.

Stephen Andy for respondent.

The Court delivered the following

JUDGMENT:—We are of opinion that the right to possession arose coincidently with the right to the execution of a conveyance by the defendant. Both rights are declared under S. 55 of the Transfer of Property Act; and in the case cited in *Nathu Valad Pandu* v. *Bhudu Valad Bhika*, I. L. R., 18 B., 537. It is admitted that the contract of sale created in the purchaser a right of possession. The decision appears to proceed on the peculiar facts of the case. The District Munsif was, therefore, right in his conclusion.

We must reverse the decree of the District Judge and restore that of the District Munsif. Respondent must pay costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Raman Chetti ... ... Appellant* (*2nd Plaintiff*)

v.

Kadirvalu and others ... Respondents (*Defendants 3 to 7*).

Raman Chetti v. Kadirvalu.

Indian Limitation Act XV of 1877, S. 12—Time taken to obtain copies of judgment and decree included.

Under S. 12 of the Limitation Act, in computing the period of limitation prescribed for an appeal, the time taken to obtain a copy of the decree and the time taken to obtain a copy of the judgment must both be excluded except where these two periods overlap each other; and where they do overlap, the time overlapped shall be excluded only once.

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*S. A. No. 87 of 1897. 29th March 1898.

Second appeal from the decree of the Subordinate Judge's Court of Madura (East) in A. S. No. 342 of 1896 presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 600 of 1895.

Raman Chetti
v.
Kadirvalu.

The facts of the case appear sufficiently from the judgment of the Court.

P. R. Sundara Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—It is objected that the appeal was not within time—that deducting the time taken in obtaining copy of the decree—the appeal was one day late or deducting that for obtaining copy of the judgment it was two days late. It was contended for the respondent that the appellant could claim only one or the other period, whichever was the longer. This contention is, however, opposed to the clear language of S. 12 of the Limitation Act, which allows the exclusion of both the periods. Doubtless, such portion of the time in obtaining one as forms a portion of the time in obtaining the other, cannot be treated as two separate periods and allowed twice over, but any period over and above that occupied in common should be allowed to be counted. In this case the copy of the judgment was applied for on the 27th October and that of the decree on the 28th October. The former copy was ready on the 31st October and the latter on the 2nd November. The time, therefore, occupied in obtaining both copies was from 27th October to 2nd November; that is seven days. The appeal was presented on the 97th day from the date of decree. Allowing the seven days for obtaining copies, it was within 90 days allowed and so in time.

As to the second appeal itself, on the findings of the Subordinate Judge no question of law arises. It is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Revur Subba Row ... ... Appellant * (*1st Defendant*)

v.

Papi Reddy ... ... Respondent (*Plaintiff.*)

Suit on a bond executed by manager of a Hindu family—Suit of a small cause nature—Civil Procedure Code, S. 586—Pro. Small Cause Court's Act, Sch. ii, Cl. 19.—S. 622 Civil Procedure Code refusing to exercise discretion under.

Revur Subba Row
v.
Papi Reddy.

* S. A. No. 36 of 1897. 15th April 1898.

Revur Subba Row v. Papi Reddy.

A suit against the members of a Hindu joint family on a bond executed by the managing member of the family for Rs. 500 and borrowed for family purposes is a suit of a small cause nature, and no second appeal lies in such a suit.

Srinivasa v. *Sivakolundu*, I. L. R., 12 M., 349, referred to.

Cl. 19, Sch. ii of the Provincial Small Cause Act applies only to suits for a declaratory decree properly so called, and not to suits in which the declaration is merely introductory to other reliefs claimed.

Second appeal from the decree of District Court of Nellore in A. S. No. 337 of 1893 affirming the decision of the Court of the District Munsif of Nellore.

This was a suit to recover Rs. 489 due on a simple bond executed by the 1st defendant to plaintiff. That was a debt contracted by the 1st defendant as managing member for family purposes and, consequently, the 2nd defendant, the son of the 1st defendant, was also sought to be made liable. The suit was instituted on the regular side of the Sub-Court. Both the Sub-Judge and, on appeal, the District Judge held that the suit was one not cognizable by a Court of Small Causes and on the merits decreed the plaintiff's suit making the 2nd liable to the extent of the family property in his hands. The 1st defendant then preferred a second appeal and a revision petition under S. 622, C. P. C., to the High Court and contended that the suit had been wrongly tried in a Court which had no jurisdiction to try it.

S. Subrahmania Aiyar for appellant.

M. K. Vydianathaiyar for *N. Subrahmaniam* for respondent.

The Court delivered the following

JUDGMENT:—Both the Courts below have lost sight of the fact alleged by the plaintiff in his plaint and not denied or made the subject of an issue by the defendants and which we must, therefore, take to have been admitted, *viz.*, that the debt was contracted by the 1st defendant as managing member for a purpose binding on the family. In this view the principle underlying the decision in *Srinivasa* v. *Sivakolundu*, I. L. R., 12 M., 349, has no application; nor is the suit excluded from the Small Cause Jurisdiction by Cl. 19 of Sch. II of the Small Cause Courts Act, since that clause applies only to suits for a declaratory decree properly so called, and not to a suit in which the declaration is merely introductory, as in this case, to the real relief sought for, *Khursedji* v. *Pestonji*, I. L. R., 12 B., 578. We are of opinion that the suit is one of a small cause nature, and being for a sum less than Rs. 500, no second appeal lies.

We, therefore, dismiss this second appeal with costs.

Revur Subba Row v. Papi Reddi.

We are, however, asked by the 1st defendant in C. R. P., 2 of 1897, to interfere under S. 622, C. P. C., on the ground that the suit being one of a small cause nature ought not to have been tried by the District Munsif on the Original Side, but by the District Judge on the Small Cause Side. As to this we observe that neither party took the action which he might have taken under S. 646-B. of the Civil Procedure Code to have it authoritatively decided before trial which was the Court with jurisdiction to try the suit. Both the Courts below gave a decision against the present appellants on the merits as well as on the technical question of jurisdiction. The only effect of our now interfering under S. 622, would be to require the District Judge as a Small Cause Court to try again the matter which he has already tried as an appellate Court. To do this would, we think, under all circumstances be a perverse and mischievous exercise of the discretion vested in us under S. 622.

We, therefore, decline to interfere and we dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Vayiravan Asary ... ... Appellant* (*2nd Plaintiff*)

v.

Ponniah and others ... ... Respondents (*Defendants*).

Vayiravan Asary v. Ponniah.

Indian Limitation Act XV of 1877, Sch. ii, Art. 106 and 116—Suit for account of dissolved partnership.

The plaintiff sued for an account and share of profits of a partnership, of which he and the defendants and M were members. The partnership was entered into under a registered agreement executed in 1890, and was not for any fixed term. M. died on 15th June 1891; the partnership business was completed on the 30th August 1891, and the suit was brought on the 3rd September 1894.

Held: that Art. 116, Sch. ii of the Limitation Act had no application and that the suit was barred under Art. 106 of Sch. ii.

Ranga Reddi v. *Chinna Reddi*, I. L. R., 14 M., 465, referred to.

Per Curiam.—We are not prepared to say that the Art. (116) can be stretched to cover every case in which the plaintiff's claim may, in its origin, be referred to a contractual relation which is expressed in a registered agreement.

Second appeal from the decree of the District Court of Madura in A. S. No. 90 of 1896, affirming the decree of the District Munsif of Madura in O. S. No. 582 of 1894.

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* S. A. No. 230 of 1897. 6th April 1898.

Vayiravan Asary v. Ponniah.

This was a suit for an account of a partnership and for the recovery of plaintiff's share of the capital and profits for the defendants 1 and 2. Plaint alleged that the father of the plaintiff, the father of defendants 1 and 2, and defendants 3 and 4 entered into a partnership under a registered agreement in respect of certain contract works, that all the partners were attending to the work till the death of the father of defendants 1 and 2, and that the surviving partners completed the works in October 1891. The defendants 1 and 2 contended that the partnership was dissolved on the death of their father, which took place on the 15th June 1891, and the suit was barred by limitation, as it had been instituted only on the 3rd September 1894. The District Munsif found that the works terminated on the 30th August 1891, and that the suit was barred under article 106, schedule 2 of the Limitation Act, whether the dissolution be taken to have occurred from the date of death of the father of the defendants 1 and 2, or from the date of the termination of the partnership. On appeal the District Judge affirmed the District Munsif's decision. Plaintiff then preferred this second appeal.

V. C. Seshachariar for appellant.

T. Rangaramanujachariar for 1st respondent.

The Court delivered the following

JUDGMENT :—A wide meaning has, no doubt, been given to the words of Art. 116 of the schedule to the Limitation Act. But the present case—a suit for an account by one partner against another after dissolution of the partnership—in our opinion, is altogether beyond the scope of the article. The only case approching this one (*Ranga Reddi* v. *Chinna Reddi*, I. L. R., 14 M., 465) is plainly distinguishable. We are not prepared to say that the article can be stretched to cover every case in which the plaintiff's claim may, in its origin, be referred to a contractual relation which is expressed in a registered agreement.

The application is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

The Adoni Municipal Council ... Appellants * (*Defendants*)

v.

Kallamma ... ... Respondent (*Plaintiff*).

The Adoni Municipal Council *v.* Kallamma.

Hindu Law—Gift by widow—Religious gifts—Husband's spiritual benefit essential.

A Hindu widow alienated a small portion of her husband's estate to a Municipality "for the purpose of getting a choultry built thereon and with a view of getting salvation to my (her) elders as well as myself (herself)."

Held: that the widow had no power to make such alienation and that it was not binding on the reversioners.

Second appeal from the decree of the District Court of Bellary, in A. S. No. 98 of 1895, reversing the decree of the Court of the District Munsif of Gooty, in O. S. No. 478 of 1894.

The facts of the case appear sufficiently from the following judgment of the District Judge.

"Plaintiff is the daughter of one Nanjundappa who died in 1877, leaving extensive property. This property devolved on his widow Sugamma, who was plaintiff's step-mother. In July 1882, Sugamma made a gift of ⅔ acre of land worth Rs. 100 in Adoni to the Municipal Commissioners of Adoni for building a chuttram. The document (Exhibit I) recites that as the Vice-President had asked her to give this land, she had given it with a view to secure spiritual benefit (*punyam*) to herself and her elders. She died in August 1882, and plaintiff succeeded to the whole of Nanjundappa's property. Plaintiff was then 12 or 13 years old. In 1883, plaintiff executed a general power of attorney (Exhibit II) to her husband. For years the Municipality did nothing with the land given by Sugamma nor did they restore it, though petitioned in 1885 and 1888 by plaintiff's husband to restore it, on the ground that they had done nothing with the gift. Eventually the Municipality, on the plea that they had no money of their own to build the chuttram gave permission to a third party to build a chuttram on it.

All the above facts are admitted on both sides. I understand that the chuttram is not yet even begun. Plaintiff now sues for restoration of the land.

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* S. A. No. 798 of 1897. 2nd May 1898.

The Adoni Municipal Council v. Kallamma.

I have no doubt that Sugamma's gift was invalid."

C. Ramachandra Rao Sahib for appellant

R. Kuppusami Aiyar for respondent

The Court delivered the following

JUDGMENT :—The object of the gift was mere charity and was in no way connected with the spiritual benefit of the donor's husband. No authority is shown in support of the contention that a gift made in such circumstances is binding on the reversioners. The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, Mr. Justice Davies and Mr. Justice Moore.

Arunachellam Chetti and another ... Appellants* (*Plaintiffs*)

v.

Aiyavaiyan and another ... ... Respondents (*Defendants 2 and* 3).

Aurnachellam Chetti v. Aiyavaiyan.

Mortgagor and mortgagee—Usufructuary mortgagee, possession not given to—Mortgage-money, rights to sue for, by sale of property—Section 68, Transfer of Property Act—Limitation Act, Sch. II, Art. 120 and 132.

A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged though empowered under S. 68 to sue for his mortgage-money is not entitled in such suit to claim an order for the sale of such property.

The defendants mortgaged some property to the plaintiffs under usufructuary-mortgage executed in February 1887. The plaintiffs were not given possession of the property and they sued the defendants for the realization of the mortgage amount by sale of mortgaged property in the year 1895.

Held: that the plaintiffs had no right to claim an order for the sale of the mortgaged property and that the suit was barred by limitation.

Second appeal from the decree of the District Court of Madura in A. S. No. 618 of 1895, reversing the decree of the District Munsif of Mana Madura in O. S. No. 14 of 1895.

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* S. A. No. 1412 of 1896. 20th July 1898.

Arunachellam Chetti v. Aiyavaiyan.

The first defendant mortgaged a house on land to one Ramachandra Aiyan in February 1887 for Rs. 400 for a term of seven years. The plaintiffs purchased the mortgage right from Ramachandra Aiyan in 1893 and sued the defendants for the mortgage-money alleging that they had deprived them of the possession of the property. They sought to recover the money by the sale of the mortgaged property. The suit was brought in 1895. The Munsif decreed the plaintiff's claim. On appeal, the District Judge found that neither the plaintiffs nor their predecessor in title was ever given possession of the property, that the defendant did not know of the transfer to the plaintiffs and that it cannot, therefore, be said that they, the defendants, failed to deliver possession to the plaintiffs within the meaning of S. 68 of Transfer of Property Act, and he, accordingly, dismissed the plaintiffs' suit.

The plaintiffs then preferred this second appeal to the High Court.

The Court (Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Boddam*) made the following

ORDER:—The lower appellate Court was right in holding that the instrument sued upon, which purports to be a usufructuary mortgage, contains no covenant to pay. Nevertheless as possession of the land comprised in the instrument was not given to the alleged mortgagees, this suit for the recovery of the money said to be due would lie under S. 68 of the Transfer of Property Act, if the instrument sued on represents a real transaction and is not a mere collusive document as alleged by the defendants and if the claim is not time-barred.

As to the first point, the lower appellate Court recorded no finding. As to the latter point, that depends upon the further question whether in a case like this a decree for the sale of land could be properly given.

Before entering into the question of limitation, it appears to us advisable that there should be a finding upon the question whether there was a real mortgage or whether the plaint-mentioned instrument was a mere sham document. The District Judge should submit a finding upon the above question on the evidence on record.

Arnachellam Chetti *v.* Aiyavaiyan.

The finding is to be returned within thirty days from the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

In compliance with the above order the District Judge submitted the following

FINDING :—The High Court has called for a finding whether there was a real mortage or not.

2. The District Munsif finds this issue in the affirmative and, in my opinion his finding was justified on the evidence.

3. The burden lay on the defendants who repudiated $\frac{\text{Exhibit B.}}{1887}$ —the mortgage-deed—a registered instrument. The writer and two attesting witnesses for the defendant state that no consideration passed. Two attesting witnesses—the Ambalagar and Karnam—for the plaintiffs say that there was consideration. There is thus a conflict of evidence.

4. The defendants allege that Exhibit B was executed to save their immoveable properties from attachment to satisfy a decree of the Sivaganga Zamindar. But curiously enough only *portion* of the defendants' property was mortgaged under B. Then again Exhibit B comes from the custody of the plaintiffs. Defendants allege that it was stolen. This did not come out till after Exhibit A—assignment in favour of plaintiffs—came into existence. No steps were ever taken to get the theft detected and the thief punished.

5. There is reason to think from Exhibits D, E and E, that the assignor of plaintiffs had possession of the property, and if so, it would be additional evidence that the transaction (Exhibit B) was a real one.

6. Plaintiffs allege that Exhibit B was executed to obtain money to clear off the debt due by D. W. 5—a relation of the defendants—under a decree. There was such a decree, but there is not much evidence that it was cleared off by the loan under Exhibit B.

7. On the whole, however, I think Exhibit B was a real mortgage, and I find accordingly.

This second appeal coming on again on the 25th of January 1898 for hearing after the receipt of the above finding of the lower appellate Court, the same Division Bench made the following

ORDER OF REFERENCE TO A FULL BENCH :—The instrument sued upon being found to be not a mere sham transaction but a real mortgage, it is necessary to decide the question of limitation. The suit is barred if the plaintiff cannot ask for a

Arunachellam Chetti v. Aiyavaiyan.

decree for sale, but is not barred, if he can. Is he then entitled to claim such relief? According to *Samayya* v. *Nagalingam* (I. L. R., 15 M., 174) he cannot claim the relief. But a decision to the contrary was arrived in *Linga Reddi* v. *Sama Rau* (I. L. R., 17 M., 469 at 471 and 472). Of these views it is difficult to agree with the one adopted in the former ruling. For that view of the law would sometimes lead to a practically absurd result as where a man grants a usufructuary mortgage of the only item of property he owns, but omits to deliver or fails to secure possession of the property to the mortgagee. In such a case if the mortgagee sues and obtains a decree for the money, it would in reality be useless. For under S. 99 of the Transfer of Property Act, he cannot cause the property to be sold without getting a decree for sale, and such decree he cannot get according to the view referred to. This very anomalous result could not have been intended by the Legislature. No doubt S. 67 of the Transfer of Property Act lays down that a usufructuary mortgagee as such cannot institute a suit for sale. That section, however, evidently contemplates the case of a usufructuary mortgagee in possession and enjoyment of the property mortgaged. It is true that S. 68, which refers to the case of a mortgagee who has been denied such possession and enjoyment, whilst giving a right to sue for the money says nothing about his title to an order for sale. That cannot, however, be held to prohibit by implication such an order being given in his case. The object of this section is to point out in what cases a mortgagee can sue for the mortgage-money and not to lay down whether in so suing he can ask for the sale of the mortgaged property. This is manifest from clause (*a*) of the section since it cannot be argued that in the case referred to therein, *viz.*, where there is a covenant to pay, no order for sale can be claimed because no reference to such an order is to be found in the section. The reason why a usufructuary mortgagee cannot ordinarily sue for the mortgage-money of course is that the parties to such a transaction intend that the money ought not to be claimed so long as the mortgagee is in possession of his security. When, however, that consideration fails through the fault of the mortgagor, it is but just that the mortgagee should have the right to claim not only the money but also as accessory thereto an order for the realization of the money by means of that which undoubtedly was originally intended to secure its payment, though

Arunachellam Chetti v. Aiyavaiyan.

that intention was to be carried out in a different way, *i.e.*, by giving possession of the security. It is impossible to see what claim the mortgagor who is in default can have upon the consideration of the Court so as to warrant it in declining to grant to the mortgagee, the party wronged, what in certain circumstances would be the only effective remedy, *viz.*, an order for sale.

The following question is therefore referred for the decision of a Full Bench:—

Is a usufructuary mortgagee, to whom the mortgagor fails to deliver or to secure possession of the property mortgaged, entitled to claim in a suit for the money, an order for the sale of such property?

V. C. Desikachariar for appellants.

K. N. Aiya for *S. R. Ramasubba-Aiyar* for respondents.

The Full Bench expressed the following

OPINION:—Assuming that the facts of the case are such as to raise any question under S. 68 of the Transfer of Property Act, we are of opinion that the plaintiff is not entitled to institute a suit for sale.

The contention really is that at the option of the mortgagee or in the cases mentioned in S. 68, a usufructuary mortgagee is entitled to have his mortgage treated as a simple mortgage. The right to sue for sale is not provided for by the contract between the parties and is not to be found in S. 68 without doing violence to the language of the section. In the case in I. L. R., 17 M., the point now raised does not seem to have been decided. There is no hardship in the matter, for the remedy is to sue for possession of the property for which he has bargained. We answer the question in the negative.

This second appeal coming on again for final hearing on 22nd July 1898 after the expression of the opinion of the Full Bench, the Division Bench *Subrahamania Aiyar* and *Boddam*, J. J. delivered the following

JUDGMENT:—The suit is barred under the Full Bench ruling. The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Asan Koothoo Sahib Mercoyar and others. ... Appellants* (*Defendants* 1 *and* 4 *and 1st defendant's representatives*)

v.

Ramanatha Chetty... ... Respondent (*Plaintiff*).

Asan Koothoo Sahib Mercoyar *v.* Ramanatha Chetty.

Bottomry bond, essentials of—Hypothecation of ship—Uncertainty of contract.—*Yoggyam adamanam.*

A bottomry bond given by the owner of a ship must, to be valid, be given at a place where he has no personal credit or security other than the bond.

A bond hypothecating a ship after reciting the consideration and the security, imposed a personal liability on the hypothecators for re-payment of the amount within a fixed time and stated that "if the money is not paid within the stipulated time, we (the hypothecators) shall add vattam at Rs. 20 per cent. per annum on the amount of principal and interest accruing on that date, adding vattam once in twelve months until date of payment, after the stipulated time, on the *adamana yoggyam* of the said ship and get back this mortgage bond."

Held: that the bond was not valid as a bottomry bond, and that as a mere hypothecation the provisions therein contained for vattam on yoggyam of the ship were void for uncertainty, the word *yoggyam* being indefinite in its signification.

Appeal from the decree of the Subordinate Judge's Court of Negapatam in O. S. No. 43 of 1895.

The facts of the case appear sufficiently clear from the judgment of *Subrahmania Aiyar*, J.

K. Narayana Rao for *C. Ramachandra Rao Saheb* for 2nd to 6th appellants.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar*, J.:—It was contended for the appellants that the Subordinate Judge erred in finding that the respondent advanced under Exhibit A, Rs, 9,647-3-6 and under the arrangement come to subsequent to that document Rs. 7,551-9-5. But the Subordinate Judge has not allowed any item of advance claimed by the respondent not supported by duly-proved vouchers. The evidence thus accepted by the Subordinate Judge is practically uncontradicted and in my opinion quite trustworthy. I have no

* A. No. 130 of 1897. 3rd August 1898.

Isan Koothoo Sahib Mercoyar v. Ramanatha Chetty.

hesitation, therefore, in holding that the plaintiff has proved that advances to the extent stated above were made by him.

The next question for determination is, whether the respondent is disentitled to recover the whole or any portion of his claim, inasmuch as the barque *Lord Harris,* referred to in Exhibit A, became a wreck subsequent to 21st March 1891, the date fixed in the document, with reference to the payment of the money due thereunder. This depends, in one aspect of the matter, upon whether the transaction is, as contended for the appellants, supportable as a bottomry bond. Now, though not only a master but an owner also may give a bottomry bond (Duke of Bedford, 2 Hagg. Ad. 294), yet to the validity of such a bond given by an owner, it is necessary to show, as was laid down in several cases, that he had no adequate personal credit or security, other than the bond, available at the port where it was given. In the early case of the *Nelson,* Lord Stowell observed: "It is certainly the vital principle of this species of bonds" (bottomry) "that they shall have been taken where the owner was known to have no credit, no resources for obtaining necessary supplies" (1 Hagg. Ad. at page 175). This language was quoted and relied on in the case of the *Hersey* where Sir John Nicholl added, "if they" (the necessary supplies) "can be procured upon the credit either of the master or of the owners or by advances on the freight or by passage money or upon any other credit than the hypothecation of the ship, the bond of hypothecation" (viewed as a bottomry bond) "is absolutely void" (3 Hagg. Ad. at page 408). Did the condition thus required by the authorities exist in the present case? Clearly not. For Exhibit A itself shews that in the first instance the owners undertook a personal liability which was to subsist for a period of about five months from the date of the bond, *i.e.,* up to the 21st March 1891. This circumstance alone is fatal to the contention that the transaction should be viewed as a valid bottomry bond, and it is unnecessary to consider whether another objection urged on behalf of the respondent against the appellants' said contention is well founded, the objection being that the instrument could not operate as a bottomry bond, inasmuch as it was executed by the owner in a place which was not a foreign port to him. I consequently hold that Exhibit A could not be supported as a bottomry bond.

Asan Koothoo Sahib Mercoyar v. Ramanatha Chetty.

Next, taking, as was argued for the respondent, that the transaction is a hypothecation not amounting to a bottomry bond, the question is as to the validity of the portion of the instrument which provides for the contingency of the amount lent not being paid back within the 21st March 1891. In this connection it is first necessary to consider the meaning and effect of the word "*yoggyam*" used in the instrument to qualify the vernacular term for hypothecation. The meaning of the word does not appear to have been considered in any decided case. And no attempt was made in the present instance to prove what is denoted by the word according to mercantile custom, if such a custom exists with reference to it. According to Rottler's dictionary "*yoggyam*" sometimes in Tamil usage means 'chance,' 'hazard,' 'danger' and the phrase "*yoggyathukku kodukkirathu*" is explained in the same work (1) 'to advance money, &c., to an honest man trusting to his honesty; (2) 'to risk one's own money, &c., on a ship or otherwise.' That, in Exhibit A, the word was inserted to indicate that the lender, in consideration of his receiving higher interest subsequent to the 21st March 1891, consented to his right to recover the money after that date being made to depend on the safety of the barque is not denied, though the parties are not agreed as to the circumstances in which the loss of the vessel should take place to disentitle the lender from claiming his money. The respondent in his evidence stated that he was not to be affected unless the vessel was lost during a voyage. On the other hand, one of the appellants and a relation of his say that it is immaterial whether the loss occurs during voyage or when the vessel is in port, as was the case in the present instance. Neither view could, in my opinion, be accepted, sought to be established as it is by such meagre and interested evidence. In this state of things, could the provisions of the document, as to what was to be the result to the lender if the money remained unpaid within the 21st March 1891 and the barque was lost subsequently, be held to amount to a valid agreement? I think not, since though the parties might have thought that after the 21st March the money was risked by the respondent upon the safety of the vessel, yet they have failed to express themselves with the definiteness indispensable to an enforceable agreement, the term *yoggyam* used with reference to the risk believed to be undertaken being very vague in itself and the contract being entirely silent on several points on which in a case like this the parties thereto were bound to make up their minds

Asan Koothoo Sahib Mercoyar *v.* Ramanatha Chetty.

and indicate with reasonable clearness what their intentions as to those points were if effect is to be given to their agreement by a Court of Justice. To explain myself, whether it was the intention that the respondent was to be deprived of his money even if the vessel was destroyed while in port, or whether it was intended that he was to be affected only if the loss of the vessel happened during voyage and if the latter loss during what particular voyage or voyages, it being distinctly understood that the barque was to make more than one, was contemplated—these are matters which should have been settled and provided for in the contract. It was equally necessary that the document should have stated loss resulting from what cause or causes, *e.g.*, such and such perils of the sea was to disentitle the lender from claiming repayment. As to these absolutely-essential points, the document is completely defective. Therefore, the portion of the instrument dealt with above must be held to be void for uncertainty. And it follows that on the one hand the respondent's right to recover his advances is unaffected by the fact that the barque became a wreck subsequent to the 21st March 1891, and on the other hand, that he is not entitled to the higher interest or vattam at 20 per cent. agreed to be paid in consideration of a risk which was never legally undertaken by him. I would, therefore, modify the decree of the Subordinate Judge by awarding to the respondent on account of the first item claimed in the plaint Rs. 9,647-3-6 with interest at 12 per cent. per annum and on account of the second item Rs. 8,427-10-2 with interest at the same rate on Rs. 7,551-10-2 thereof, minus the sums found by the Subordinate Judge to have been received by the respondent with interest thereon at the above rate. The appellants will pay and receive proportionate costs in this appeal.

As to the memorandum of objections, I think that the Subordinate Judge was justified in declining to act upon the respondent's accounts in the absence of vouchers or other more satisfactory evidence, especially with reference to so large an amount as Rs. 6,781-12-8 included in the second item in the plaint. I would, therefore, dismiss the memorandum of objections with costs.

Davies, J.:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Moore.

Blake ... . Appellant* (*Plaintiff*)

v.

Savundarathammal and others ... Respondents (*Defendants*).

Kasavargam tenant—Right to dwelling house of Kasavargam.

Blake v. Savundarathammal.

A Kasavargam tenant has a proprietory right to his house, and when ejected is entitled to compensation for his buildings.

Socond Appeal from the decree of the District Court of Tanjore in A. S. No. 521 of 1895 affirming the decree of the Court of the District Munsif of Tanjore in O. S. No. 23 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

P. R. Sundara Aiyar for appellant.

Respondent was not represented.

JUDGMENT:—A Kasavargam tenant has, according to Wilson (see Glossary), a proprietary right to his house and the Sudder Court ruled in *Appa Pillai* v. *Gopalasami Reddi* (decision of 1860, page 41) that when ejected the Kasavargam tenant was entitled to compensation for his buildings. The Munsif found this was a recognised principle and there was no denial that it was an incident of Kasavargam tenancy. The Judge agreed with the Munsif; and as the decision is supported by express authority of old date, we have no doubt that it is correct in law. The amount granted as compensation is not a question of law. The second appeal therefore fails and is dismissed.

* S. A. No. 834 of 1897. 26th July 1898.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Subrahmania Aiyar.

Hammick ... ... Appellant*

v.

The President, Madras Municipal Commission ... Respondent.

Hammick *v.* The President, Madras Municipal Commission.

The Madras Municipality Act (Act I of 1884) Ss. 103 and 105—Profession tax—What amounts to exercising profession or holding an office under the section.

The Inspector-General of Police, Madras, does not always and necessarily exercise his profession or hold his office in Madras within the meaning of Ss. 103 and 105, Madras Municipality Act, even though his headquarters may be permanently located within its municipal limits. His office is not one inseparably connected with Madras, the duties of which cannot be discharged elsewhere. If he is absent from Madras on tour and has not been in it for sixty days or more in any half-year, he is not liable to be taxed for that period under S. 105.

Chairman, Ongole Municipality v. *Mounsey*, I. L. R., 17 M., 453 followed.

Case referred by the Presidency Magistrate, Black Town, under S. 193 of Act I of 1884.

The facts appear sufficiently from the opinion of the Court.

K. Brown for appellant.

E. Norton, instructed by *Barclay, Orr and David* for respondent.

The Court delivered the following

OPINION:—The question referred to us is whether upon the facts stated Mr. Hammick did within the City of Madras hold the office of Inspector-General of Police for more than sixty days in the half-year? The question is in our opinion really concluded by the decision in the *Ongole Case* in I. L. R., 17 M., 453, but it was sought to found a distinction in the admission made in the case to the effect that the office of the Inspector-General is a permanent one in Madras and that there is an Assistant Inspector-General of Police during the latter's absence on tour. We are of opinion that these circumstances will make no difference. The person liable to pay under S. 103 of the Act is the person who within the City exercises an art, profession or trade or holds an office. There are offices inseparably connected with Madras, the duties of which cannot be discharged elsewhere. The office of Inspector-General of Police is not of that character; for it appears to be part of his duty to make

* Referred Case No. 15 of 1898. 25th July 1898.

tours. When he is absent from Madras on a tour, it is suggested that, nevertheless, he is still holding an office in Madras, because another officer signs letters on his behalf. If this were the correct view, it must follow that Mr. Hammick can be said to hold office at two places at the same time. Hammick v. The President, Madras Municipal Commission.

But the real answer to the argument is that the Assistant Inspector-General does not perform the functions of the Inspector-General. The Assistant Inspector-General discharges his own functions—and personally he has to pay a tax in respect of the office he holds. So far as the language of the schedule to which we were referred has any bearing on the case, it is against the claim of the Municipality. Because it shows that the gumastah on the spot and not the absent principal is to be taxed.

Construing the words of the Act according to their ordinary acceptation and following the decision in the Ongole Case, we decide the question referred in the negative.

There seems to be no power to give costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Karuppanan Ambalam ... ... *Plaintiff* *

v.

Ramasami Chetti ... ... *Defendant.*

Karuppanan Ambalam v. Ramasami Chetti.

Provincial Small Cause Court's Act IV of 1887, Sch. II, Art. 35, Cl. j—Suit for money paid in excess under pressure—Jurisdiction.

Art. 35, Cl. J. Sch. II of Act IX of 1887, applies only to suits for the recovery of compensation for damage caused to the aggrieved party by an illegal, improper or excessive distress. It has no application to suits to recover money levied in excess under the illegal distress.

Dewany Roy v. *Sundar Tewary*, I. L. R., 24 C., 163, followed

Case stated under S. 646 B of Act XIV of 1882, by the District Judge of Madura in O. S. No. 431 of 1897, on the file of the Court of the District Munsif of Shivaganga (S. C., S. 400 of 1897, East Sub Court's file, Madura).

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* Referred Case No. 27 of 1897. 12th November 1897.

Karuppanan Ambalam v. Ramasami Chetti.

The following letter of reference from the District Judge states fully the facts.

"The plaintiff in the suit is the tenant and the defendant is the landlord. Plaintiff sues to recover from the defendant a sum of Rs. 138-10-5 which the defendant has collected in excess of what is properly due to him upon demand and distraint of plaintiff's cattle.

The suit was originally filed in the East Sub-Court, Madura, on the Small Cause side in S. C. No. 400 of 1897. The Sub Judge returned the plaint for presentation to the proper Court holding that it was not triable by the Court of Small Causes under Art. 35, Cl. j of the 2nd Schedule to Act IX of 1887. Secondly, the plaint was presented in the District Munsif's Court of Shivaganga where it was filed in O. S. No. 431 of 1897. The District Munsif in his turn, returned the plaint for presentation to proper Court holding that the suit was a suit for money and not triable on the Original Side, Vide. *Lalla Bhagun Pershad* v. *Holloway*, I. L. R., 11 C., 393.

I am of opinion that the case should be entertained on the Original Side as there has been alleged excessive distraint under Art. 35, Cl. j of the 2nd Schedule to Act IX of 1887."

Plaintiff was not represented.

V. Krishnaswami Aiyar for defendant.

The Court expressed the following

OPINION:—The suit was to recover back money paid in excess of the amount due, under pressure. It was not a suit to recover compensation for illegal, improper or excessive distress or attachment within the meaning of Art. 35, Clause j of the 2nd Schedule of the Provincial Small Cause Court's Act of 1887. This has been held to apply only to cases where the suit is brought to recover damages for the tort, *Dewany Roy* v. *Sundar Tewary*, I. L. R., 24 C., 163 at p. 165 and not for many paid in excess, and with this ruling we agree. The suit is therefore one cognizable by a Court of Small Causes as the Munsif held.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Nittukaruppa Goundan ... .. Appellant* (*2nd Defendant*)

v.

Kumarasami Goundan and others... Respondents (*Plaintiffs and 1st Defendant.*)

Limitation Act II., Art 132—Bond payable "*on demand* or when you require" after a contingency—"On demand or when you require" meaning of.

Nittukaruppa Goundan *v.* Kumarasami Goundan.

A hypothecation bond after fixing a term of 3 years for the re-payment of the principal and interest due under it, stipulated that the interest under the bond shall be paid each year and proceeded as follows; "In default of paying on the above dates I shall pay the said sum with interest at 15 Rs. per cent. per annum, from the date of the bond, irrespective of the above due date, whenever you make the demand."

Held: That the cause of action to sue for the money due under the bond does not arise immediately on failure to pay the interest of any one year, but only arises on actual demand made after such failure.

Perumal Ayyan v. *Alagirisami Bhagavathar,* 20 M., 245 referred to; and S. A. 500 of 1897 followed.

Appeal from the order of the Subordinate Judge's Court of Bellary and Salem at Salem, dated 9th December 1896, in A. S. No. 113 of 1896, reversing the decree of the District Munsif's Court of Namakkal in O. S. 413 of 1895 and remanding the same for rehearing.

This was a suit to recover the principal sum of Rs. 800 and interest due under a hypothecation bond executed in the year 1880 by the 1st defendant in 1st plaintiff's favour. The portion of the bond necessary for the purpose of this report ran as follows:—

"As I have thus received the entire sum of Rs. 800, &c., it shall bear interest at Rs. 10 per cent. per annum, and I shall not only pay the principal and interest and receive back this bond on the 25th *Purattasi* of *Subanu* (9-10-83) which is the next 3rd year, but shall pay you the interest due in each year and take receipt from you. In default of paying on the above dates, I shall pay the said sum with interest at Rs. 15 per cent. per annum from the date of the bond, irrespective of the above due date, whenever you make the demand."

* C. M. A. No. 84 of 1897. 15th April 1898.

Nittukaruppa Goundan v. Kumnrasami Goundan.

The defendant had paid no interest due under the bond and the suit was filed 1896. The defendants pleaded that the suit was barred by limitation. The Munsif dismissed the suit holding that the money was payable in 1881, when the first default in the payment of interest was made. On appeal, however, the Sub-Judge held that the money did not become payable until after demand made, and so reversed the decision of the Munsif. The defendants then preferred this appeal to the High Court.

V. Bhashyam Aiyangar and *C. R. Thiruvenkatachariar* for appellant.

C. R. Pattabhirama Aiyar and *T. V. Seshagiri Aiyar* for respondents.

JUDGMENT :—We think that in this case the words construed by the Sub-Judge as " when you require " imply a condition as was also decided in a case where the words actually used were "on demand." (S. A 200 of 1897). There the words were not considered as merely technical words, as they were interpreted to be in *Perumal Ayyan* v. *Alagirisami Bhagavathar*, I. L R., 20 M., 245. The Sub-Judge was therefore right in holding the suit was not barred, and this appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson.

Putta Hegade ... ... Appellant* (*Counter-Petitioner*)

v.

Kusamma Hegadathi ... Respondent (*Petitioner Defendant*).

Putta Hegade v. Kusamma Hegadathi.

Production of the decree-amount in Court—Court's Order to bring it another day—Sufficient compliance with orders of Court.

Where a decree ordered the payment of a sum of money by the defendant to the plaintiff within 15 days from date of the decree and the defendant without depositing the money in the treasury as required by the rules of practice, produced it in Court within the prescribed time, and the Court handed it back to him with orders to produce the same in Court on an adjourned date:

Held: That the defendant must be held to have conformed to the terms of the decree so far as the production of money on both the occasions went.

Appeal from the decree of the District Court of the South Canara in A. S. No. 63 of 1897, reversing the order of the Court of

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* A. A. A. O., 115 of 1897. 3rd May 1898.

Putta Hegade v. Kusamma Hegadathi.

the District Munsif of Karkal, in C. M. P., No. 1685 of 1896, in the matter of O. S. No. 243 of 1896.

The plaintiff sued the defendant in the District Munsif's Court at Karkal for arrears of rent and in ejectment. The Court decreed on 6th November 1896, against the defendant for rent, directing ejectment of the defendant if the money be not paid within 15 days from date of decree. The judgment-debtor produced the money in Court on the 14th day with a petition praying for the payment of the said sum to the plaintiff. The Court returned it with an order to produce it on 28th November 1896, and served a notice on the plaintiff to hear his objections if any. The defendant's vakil, again produced the money on the fixed date. The plaintiff having been absent, the Court returned the money on the ground that the vakil for the defendant did not even then choose to apply for the money being held in deposit. Thereafter plaintiff applied for the execution of the decree for ejectment. The defendant put in a petition praying that the money may be taken and the application for execution rejected. The District Munsif allowed execution to proceed and dismissed defendant's petition. The District Judge on appeal reversed his order, holding that the defendant had made no default. Thereupon the plaintiff preferred this appeal to the High Court.

K. Narayana Rao for appellant.

K. P. Madhava Rao for respondent.

The Court delivered the following

JUDGMENT:—The defendant obeyed the order of the Court by producing the money in Court within 15 days. The Court, however, without receiving the money and without rejecting it as improperly tendered, *i.e.*, as not being deposited in the Treasury as required by the Rules of Practice, handed it back to the party with orders to produce it again on the 28th idem in Court. I think that the Court must, in these circumstances, be held responsible for the money not having been paid into the Treasury within the time allowed. Had the Court simply rejected the money as not properly tendered, the case might have been different, but when it gave the party instructions as to the further custody of the money, and the party obeyed those instructions, I think the party cannot be held to have made default. The cases (*Gujadhur Pauree* v. *Naik Pauree*, I. L. R., 8 C., 528 and *Srinivasa Bhatta* v. *Malayacha*

Putta Hegade v. Kusamma Hegadathi.

Mannadi, Ib. 7, M., 211) relied on by the appellant do not support his contention, but show rather that if the debtor does his part in attempting to properly pay the money into Court, he is not responsible for any failure by the Court to duly receive it.

In the present case, the party obeyed the instructions of the Court in regard to the money, and, I think, must be held to conform to the terms of the decree, so far as the production of the money in Court on the first and second occasions goes. There is no finding that the appellant had any just cause for not attending Court to receive the money on the second occasion.

The District Judge's order is, therefore, in my opinion legally sustainable, and it is clearly just on the merits.

I, therefore, dismiss this appeal against it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Ramasami Aiyar ... ... Appellant * (*Plaintiff*)

v.

Vengidusami Aiyar and others ... Respondents (*Dfendants*).

Ramasami Aiyar v. Vengidusami Aiyar.

Hindu Law—Gift by widow, validity of.

A gift by a Hindu widow of a portion of her qualified estate, suited to the position of the family and other circumstances of the case, to her son-in-law on the occasion of her daughter's marriage is valid.

Second appeal from the decree of the Subordinate Judge's Court of Tanjore, in A. S. No. 369 of 1895, modifying the decree of the Court of the District Munsif of Tiruvalur, in O. S. No. 120 of 1893.

The facts appear clearly from the judgment of *Subrahmania Aiyar*, J.

C. R. Pattabhirama Aiyar and *T. S. Tiagaraja Aiyar* for appellant.

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* S. A. No. 324 of 1897. 20th July 1898.

V. Bhashyam Aiyangar and *C. R. Tiruvenkata Chariar* for 2nd and 6th respondent.

Ramasami Aiyar *v.* Vengidusami Aiyar.

The Court delivered the following

JUDGMENTS. *Subrahmania Aiyar, J*:—One Seshappaien died in 1859, leaving him surviving a widow the late Thaiyyu Ammal, a son and a daughter. The son as the sole surviving male member of the family to which Seshappaien belonged, took the whole of the joint estate. On his death a few years afterwards while remaining unmarried, his mother Thaiyyu Ammal inherited the estate. Subsequently, she gave her daughter in marriage and at the time of the marriage made a gift of a portion of the lands, inherited by her, to her son-in-law. The District Munsif and the Subordinate Judge held that the gift was binding upon the appellant who as the heir of the last full owner has since the demise of Thaiyyu Ammal become entitled to succeed to the property. On behalf of the appellant it was urged that a Hindu qualified owner in the position of Thaiyyu Ammal has no authority to make such a gift and even should it be held that she had, the gift in question in the present instance, ought, having regard to all the circumstances of the case, to be declared unjustifiable. As to the latter part of this contention it may at once be observed that I see no grounds for differing from the lower Court, in their conclusion that the gift cannot with reference to the extent of the whole estate and the other circumstances bearing on the matter be taken to be otherwise than fair and reasonable. The question, therefore, is, had Thaiyyu Ammal authority to make a gift of landed property inherited by her to her son-in-law at the time of her daughter's marriage? No direct ruling on the point was cited before us. Reference was, however, made to certain passages in the Mitakshara and the Smrithi Chandrika wherein the texts of Manu, Yajnavalkya and other Smrithi writers dealing with the question of allotment to be made by brothers to their maiden sisters at the time of partition are commented upon. With reference to the true meaning of these texts commentators are divided. Some of them hold that all that the texts mean is that funds required for the marriage of sisters should be provided out of their father's estate. Other commentators, Vijnanesvara among them—lay down that inclusive of their marriage expenses sisters are entitled to a provision not exceeding a fourth of what they would have got had they been males. For the purposes of this case, it is not necessary to discuss which of the two kinds is to be taken

Ramasami Aiyar v. Vengidusami Aiyar.

as law. Assuming that, as argued for the appellant, the view advocated by Vijnanesvara and his followers is not law, the fact that so high an authority as the author of the Mitakshara propounds a rule thus favorable to maiden daughters ought to make one hesitate to accept as sound the exceedingly limited construction which was insisted on behalf of the appellant and which can scarcely be said to be in itself very reasonable, *Viz*:—That the texts justify a disbursment out of the estate of only the price of things required in connection with the celebration of the marriage. In my opinion, the better and sounder view is as contended for the respondents that the authorities should be understood to empower a qualified owner like Thaiyyu Ammal to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs. Now it is well known that at the time a girl belonging to the community with which we are concerned in this case is handed over in marriage, certain other gifts have to be made to the bridegroom of which "bhudanam" a gift of land is one (See Beauchamp's Abbe Dubois on Hindu Manners, Customs and Ceremonies, p. 225). That, according to the notions of the people a gift of that kind on such an occasion is indispensable, is clear from what is done even in cases in which the family of the bride is not really in a position to give any land. In such cases, conformity to the requirements of custom is sought to be secured by giving some little money as and for land. Nor is it difficult to understand how such a practice came to prevail from time immemorial. For the gift being in reality intended as a provision for the married couple, the act was naturally treated as enhancing the merit of the primary act, *viz.*, the gift of a virgin which, from a religious point of view is supposed to be productive of considerable benefit to the parents of the virgin. It seems, therefore, but right to conclude that a gift of land to the bridegroom on the occasion of his marriage is an act warranted by the authorities and is within the power of a qualified owner like Thaiyyu Ammal, provided, of course, the gift is, having regard to the position of the family and all the other circumstances of the case, of such a fraction of the estate as would by reasonable persons be considered fair and proper.

As already stated the finding in the present instance is to that effect.

Ramasami Aiyar v. Vengidusami Aiyar.

I, therefore, concur with the lower Courts in upholding the gift and would dismiss the second appeal with costs.

Moore, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Rathna Mudaliar and others ... Appellants * (*Defendants* 1 *to* 3).

v.

Ragunadha Bhattar ... ... Respondent (*Plaintiff*).

Rathna Mudaliar v. Ragunadha Bhattar.

Hindu Law—Adoption to last owner's son—Vesting of estate in undivided brother—Invalid adoption not validated by subsequent consent of those affected by adoption.

An undivided Hindu family consisted of R and his brothers, and R's son S. S died first leaving a widow and having authorized her to adopt, R died next leaving his brothers survivors to the family estate. The widow of S then adopted a son to her husband S and the adoption was approved of by some of the brothers in whom the property had vested.

Held: That the adoption was invalid, not having been made to the last male owner and that the consent of some of the brothers would not validate the adoption.

Annammah v. *Mabbu Bali Reddy*, 8 M. H. C., 108, referred to.

Second appeal from the decree of the District Court of Trichinopoly, in A. S. No. 216 of 1894, reversing the decree of the Court of the District Munsif of Srirangam, in O. S. No. 150 of 1893.

This was a suit for an injunction directing the defendants not to prevent plaintiff from performing certain services at Srirangam, which he was entitled to perform by virtue of his hereditary office of *archakam* and *paricharakam*. The plaintiff's father Srirangaraja Bhattar died on the 21st February 1886 and was alleged by plaintiff to have left a widow authorizing his widow to adopt a son. In pursuance of this authority, the widow adopted the plaintiff on the 6th September 1888. When he became competent to perform the duties of *archakam* and *paricharakam* which had been held by hereditary right by both his adoptive father and grandfather, the defendants refused to allow him to perform the duties.

The District Munsif found the adoption to be valid, but dismissed the plaintiff's suit on the ground that the discretion of the

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* S. A. 216 of 1897. 6th April 1898.

Rathna Mudaliar v. Ragunadha Bhattar.

trustees of the temple who were also defendants in the case, cannot be questioned by the Court so long as no corruption or misconduct was proved against them and that, consequently, no injunction can be granted against them. He accordingly, dismissed the suit.

On appeal the District Judge agreed with the Munsif on the validity of the adoption but, being of opinion that injunction was a proper relief in the case, decreed the plaintiff's suit.

On the question of the validity of the adoption, his judgment was as follows.

"The second objection taken was that Srirangaraja Bhattar, plaintiff's adoptive father, was not the last full owner of the estate.

Raghunatha Bhattar survived his son Srirangaraja Bhattar and the adoption in question was made by Srirangaraja Bhattar's widow after Raghunatha's death. The family is undivided. The adoption, therefore, it is contended, divested Raghunatha's heirs (his brothers) and so was invalid.

This is not so. The son's widow could with due permission have adopted a son into the joint family during her father-in-law's life (*Sri Pratapa Raghunada Deo's case,* I. L. R., 1 M., 69, Tagore Law Lectures, 1888, p. 415. West and Buhler, 3rd Edition, p. 986) and the father-in-law's death did not alter the circumstances; in any case permission has been given by the sapindas who indeed come forward now to support the adoption (Plaintiff's 1st and 9th witness). The case in 10 M. I. A., 311 and those which have followed it, *Keshav Ramkrishna* v. *Govind Ganesh,* I. L. R., 9 B., 96; *Krishnarav* v. *Shankarrav, Ib.* 17 B., 164 do not overrule the case cited above. The adoption was not invalid on the ground of divesting, if it were regularly made with due permission. The authority to adopt is contained in Ex. A, the will of Sri Ranga Raja Bhattar. It is sworn to by the plaintiff's witnesses 1, 9 and 11 of whom plaintiff's witnesses 1 and 9 are the uncles of Sri Ranga Raja Bhattar and in no way materially interested in upholding the adoption. In fact the testator's disposal of his property is rather detrimental than beneficial to them.

The defendants then preferred this second appeal to the High Court.

C. R. Pattabhirama Aiyar and *T. Rangachariar* for appellants.

C. Sankara Nayar and *N. Narayana Aiyangar* for respondent.

Rathna Mudaliar v. Ragunadha Bhattar.

The Court delivered the following

JUDGMENT:—In the life-time of Raghunatha Bhattar, his son Srirangaraja died, leaving a widow and having by will authorized her to adopt a son. She accordingly in 1888 adopted the plaintiff after Raghunatha had died leaving brothers who took as his heirs. Some of these assent to the adoption and are willing that the plaintiff should succeed to the office which he claims.

On the authority of the cases of which the leading one is *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore,* 10 M. I. A., 279, we must hold that the plaintiff's claim by adoption fails. The adoption was not made to the last male holder and would, if valid, have the effect of divesting the estate taken on inheritance by Raghunatha's brothers, which estate includes the right to the office now claimed. An attempt was made to get over this difficulty by pleading that the brother's consent validated the adoption—but the decision in *Annammah* v. *Mabbu Bali Reddy,* 8 M. H. C. R., 108 at p. 112 is against this view, and if the adoption was invalid we do not see how it can be validated by subsequent consent. Moreover, it does not appear that all the brothers consented.

We must allow the appeal. The decree must be reversed and the decree of the District Munsif restored.

Appellants must have their costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Sankara Nambiar ... ... Appellant* (*Respondent*).

v.

Kanara Kurup ... ... Respondent (*Appellant*).

Sankara Nambiar v. Kanara Kurup.

Civil Procedure Code, S. 258—Limitation Act, Sch. III, Art. 173 (A)—Decree for surrender of property.

S. 258 of the Civil Procedure Code is applicable only to decrees under which money is payable and has no application to other kinds of decrees.

* C. M. S. A. No. 98 of 1897. 4th May 1898.

Sankara Nambiar v. Kanara Kurup.

A decree directed the surrender of certain property by the defendant to the plaintiff. The defendant surrendered the property accordingly and applied to the Court more than 90 days after the date of the surrender to enter up satisfaction.

Held: That the defendant's application was not governed by S. 258, Civil Procedure Code and that, therefore, the limitation of 90 days prescribed in Art. 173, Limitation Act in regard to that section had no application, and

that the Court executing a decree had power under the provisions of S. 244 to enquire into and pass order on such applications.

Appeal from the order of the District Judge of North Malabar in C. M. A. 21 of 1897 reversing the order of the District Munsif of Tellicherry in M. P. No. 1189 of 1896 in O. S. No. 168 of 1893.

The facts of the case appear sufficiently from the judgment of the Court.

C. Krishnan for appellant.

V. Ryru Nambiar for respondent.

The Court delivered the following

JUDGMENT:—The plaintiff obtained a decree for the surrender of land in O. S. No. 168 of 1893. On the 3rd September, 1896, the 2nd defendant, alleging that defendants had surrendered the land to the plaintiff in March 1894, asked the District Munsif to record an order stating that the decree-holder had obtained possession of the land.

The District Munsif, after enquiry, recorded a finding that the land had been surrendered. The District Judge, on appeal, observed that the application was one made under S. 258, Code of Civil Procedure, and that under Art. 173-A of Schedule III of the Limitation Act, such an application must be made within 90 days of the delivery of possession. He, therefore, dismissed the application as barred by limitation.

The 2nd defendant appeals on the ground that S. 258 applies only to cases in which the decree is for money, not for land, as in the present case; and the questions for decision are whether S. 258, Code of Civil Procedure, refers only to decrees for money, or is applicable also to decrees for possession of immoveable property, and, if the former, whether the District Munsif had any power in execution to hold the enquiry and make the order which he did on the 2nd defendant's petition?

Sankara Nambiar v. Kanara Kurup.

It seems to us that the language of S. 258 and its position in the Code indicate that it refers only to the execution of decrees for money.

Under the general heading "Of the mode of executing decrees," the Code deals separately with the various kinds of decrees that have to be executed. It begins with decrees for money and deals with them in sections 254 to 258. It then deals (S. 259) with decrees for specific performance and restitution of conjugal rights, then (sections 261-2) with decrees for execution of conveyances and endorsement of negotiable instrument, lastly (S. 263-5) with decrees for immoveable property.

Section 257 enacts that "All money payable under a decree shall be paid as follows, namely:—

(a) into the Court whose duty it is to execute the decree; or
(b) out of Court to the decree-holder; or
(c) otherwise as the Court which made the decree directs."

Then S. 257-A lays down that an agreement to give time for the satisfaction of a judgment-debt shall be void unless made for consideration, &c.

Then follows S. 258 which runs thus:—

"If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in S. 257-A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree.

The judgment-debtor may also inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after due service of such notice, the decree-holder fails to appear on the day fixed, or having appeared fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree."

Sankara Nambiar v. Kanara Kurup.

The opening words of the section "If any money payable under a decree is paid out of Court" evidently refer back to S. 257.

Clause (*b*) and the next words of S. 258 "or the decree is otherwise adjusted in whole or in part," &c., refer back to the other clauses of S. 257 and to 257-A. But S. 257 and 257-A deal only with decrees for money. Moreover, in the second line of S. 258 the words "*the* decree" clearly refer to the decree mentioned in the preceding line, which is a decree under which money is payable.

Thus the language of the section appears to us to be applicable only to decrees under which money is payable, and the position of the section in the Code supports the same view.

The District Judge held that S. 258 was applicable to the present application and relied on the case *Baba Mohamed* v. *Webb*, I. L. R., 6 C., 786; but the decision in that case was based on the words of S. 258 of Act X of 1877 which the learned Judges considered to correspond to in all material respects and to convey the same meaning as, S. 206 of the prior Civil Procedure Code (Act VIII of 1859) which, in their opinion, manifestly dealt with the adjustment of any decree.

No doubt the words in S. 206 of Act VIII of 1859 are very wide. They are "no adjustment of *a* decree in part or in whole shall be recognised by the Court unless," &c.

In the Act of 1877, however, the chapter on the execution of decrees was greatly expanded and in some respects altered, and the language of S. 258 was again altered when the present Code was passed, and we do not think that any decision as to the meaning of S. 206 of the Code of 1859 can give much guidance in construing the very different words of S. 258 of the present Code. It is suggested that S. 258 must apply to cases like the present, since there is no other section of the Code which lays down any corresponding procedure for certifying the satisfaction of decrees for immoveable property, specific moveables and so forth. We do not think that this argument is conclusive. Immoveable property is so different in its nature from money, and the difficulty of tracing and of proving or disproving an alleged payment of money is so much greater than the difficulty of proving an alleged delivery of immoveable property that the Legislature may well have made a special provision in the

case of money, which was thought unnecessary in the case of immoveable property. If it was intended that S. 258 should apply to decrees of all kinds, we should certainly have expected its language to be general instead of being so strictly limited as it is.

Sankara Nambiar v. Kanara Kurup.

We think, then, that S. 258 was inapplicable to the present case, and, therefore, the limitation of 90 days prescribed in Art. 173 of the Limitation Act in regard to that section had no application.

It is, however, admitted that if S. 258 is inapplicable, there is no other section which expressly authorizes the Court to deal with such an application as that made by the defendant in this case. We do not, however, think that the absence of express authority in the Code is any proof that the District Munsif had no jurisdiction to deal with the application. The Code does not contain an exhaustive statement of every act which may be done by the Courts. No doubt, where the Code provides a specified procedure in any matter the Courts are bound to follow the Code, but in matters not dealt with by special provisions of the Code, the Court may act under the general provisions of the Code. Under S. 244 the Court has a general authority to make orders determining any questions which arise between the parties to the suit and relating to the satisfaction of the decree. We think that the District Munsif had authority under that section to deal with the question raised by the defendant.

We must, therefore, set aside the order of the District Judge with costs in this and the lower appellate Court, and remand the appeal to the District Judge for decision on the merits.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Benson.

Satagopa Ramanuja ... ... Appellant in both cases* (2nd Defendant).

v.

Mahabir Doss Ji ... ... Respondent in both cases (Plaintiff Represenlive).

Satagopa Ramanuja *v.* Mahabir Doss Ji.

Civil Procedure Code, Ss. 361, 368—*Actio personalis moritur cum persona*—Abatement of suit.

The plaintiff as the superintendent of a temple sued the senior jaiyyangar, an officer of the temple, for loss of income and for expenses caused to the temple by his refusal to give up the keys of the temple and have worship duly performed therein. Pending the suit, the defendant died, and his successor in office was brought in as his legal representative. It did not appear that the deceased left any personal assets, or that his estate benefited by his misconduct.

Held: That the cause of action against the deceased defendant was purely personal and that with his death it came to an end and did not survive against his legal representative, and that the suit should consequently abate.

Second appeal from the decree of the District Court of North Arcot in A. S. Nos. 110 and 92 of 1894, presented against the decree of the Court of the District Munsif of Tirupati in O. S. No. 390 of 1892.

The plaintiff is the manager or superintendent of the devastanam of the Tirupati Tirumalai, &c., and the 1st defendant was the senior jaiyyangar of the said temple. The 1st defendant was in possession of the keys of the temple, and his presence was necessary at the time of the daily *puja*. Plaintiff complained that when called upon to do so on a particular day, the 1st defendant refused to open the Vencatesvarasvami temple and that therein *puja* was not performed therein for two days. He, therefore, sued the 1st defendant for the loss of the income of these two days and for the expenses incurred for a purification ceremony which had to be performed in consequence of the 1st defendant's act. Pending the suit, the 1st defendant died and the 2nd defendant, who is successor in office was brought in as his legal representative. The 2nd defendant contended that the cause of action did not survive

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* S. A. No. 918 of 1896. 6th January 1898.

Satagopa Ramanuja v. Mahabir Doss Ji.

against him, and that the suit should abate. The lower appellate Court allowed this contention and decreed the damages claimed. In overruling the plea of the 2nd defendant the lower appellate Court said:

"This claim is not peculiar to the deceased senior jaiyyangar. The exhibits show that it has been urged in one shape or another for over fifty years by successive holders of the office. It does not seem equitable to confine the liability of it to the particular holder of the office who made it. The English rule about assets in suits in tort relates only to one particular tort, viz., that in which moveables wrongfully converted have been added to the wrong-doer's estate.

"This defendant is not sued as the heir of the original defendant, but as his representative holding the same office and in possession of its endowment. The senior jaiyyangar is, as stated in the Collector's report, an ascetic who does not own any property apart from the endowment of his office. The plaintiff having been forced into incurring expense by the original defendant's wrongful act, I cannot think that a Court of Equity is precluded from holding that plaintiff can recover the expense from his successor and representative."

P. R. Sundara Aiyar for appellant.

The Officiating Advocate-General (V. Bhashyam Aiyangar), R. Satagopachariar and *S. Gopalasami Aiyangar* for respondent.

The Court delivered the following

JUDGMENT:—The question for decision in these cases is whether the plaintiff's cause of action against the 1st defendant survived upon 1st defendant's death against the 2nd defendant, who succeeded him in the office of pedda jaiyyangar. The action was one to recover compensation for loss of income, and for expenses caused to the temple by the 1st defendant's alleged refusal to give up the keys of the temple and have worship duly performed therein. Whether this misconduct on the part of the 1st defendant be regarded as a tort or as a breach of contract of personal service, in neither case do we think that the cause of action survives against his representative, for the reason that the misconduct was one purely personal to the 1st defendant and did not in any way benefit his estate. (*Haridas Ramdas* v. *Ramdas Mathuradas*, I. L. R., 13 B., 677, and *Kirk* v. *Todd*, 21 Ch. D. 484.) It has not been found that the 1st defendant left any personal assets, and it is clear from

Satagopa Ramanuja v. Mahabir Doss Ji.

the evidence of the plaintiff's 15th witness that he left none. So that even if 1st defendant's estate had been liable to the claim, there would have been no foundation for a decree against the 2nd defendant. For both these reasons, we reverse the decrees of the Courts below and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. Shephard, Officiating Chief Justice.

Simulu Ebrahim Rowthan ... Petitioner (*Plaintiff*).

v.

Abdul Rahiman Mahomed and others ... ... Respondents (*Defendants*).

Simulu Ebrahim Rowthan v. Abdul Rahiman Mahomed.

Indian Stamp Act, S 18—Foreign note—Evidence admissibility in Unstamped note:—

A pro-note made out of British India when sued upon by the first holder within British India, does not require to be stamped before it is received in evidence in the suit. It is enough if the proper stamp required by S 18 of the Stamp Act be affixed to it before decree is passed.

Griffin v. *Weatherby*, L. R., 3 Q. B., 753, referred to.

Petition under Section 25 of Act IX. of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Trichinopoly in Small Cause Suit No. 435 of 1897.

This was a suit on a pro-note for Rs. 130, executed to the plaintiff at Hathni in Ceylon. The document had, besides the stamp of Ceylon, two one-anna adhesive stamps of British India affixed to it. The District Munsif held that the pro-note was inadmissible in evidence inasmuch as it had not been stamped according to the rules under the Stamp Act, and consequently dismissed the suit. The plaintiff then preferred this revision petition to the High Court.

V. Krishnaswami Aiyar for petitioner.

The respondents were not represented.

The Court delivered the following

JUDGMENT:—I think the District Munsif was wrong in refusing to admit the promissory note in evidence.

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* C. R. P. 375 of 1897. 12th August 1898.

Simulu Ebrahim Rowthan v. Abdul Rahiman Mahomed.

Being a note made out of British India, it comes within the provisions of section 18 of the Stamp Act (I. of 1879). The first holder, who is the plaintiff, had, before presenting it for acceptance or payment, before endorsing, transferring or otherwise negotiating it, to affix the proper stamp. None of these things had happened, and the obligation to affix a stamp had not arisen.—*Griffin* v. *Weatherby*, L. R., 3 Q. B., 753.

The plaintiff's vakil is ready to affix the proper stamp before decree is passed.

I must reverse the decree and direct the District Munsif to hear the case on the merits. I shall give no costs of this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Sitharama Sastrulu and others ... Appellants * (*Defendants* 1, 2 and 10.)

v.

Suryanarayana Sastri ... ... Respondent (*Plaintiff*).

Sitharama Sastrulu v. Suryanarayana Sastri.

Judgment, contents of—Civil Procedure Code S. 574.

A District Judge on appeal from the decision of a District Munsif in a particular case referred to the facts and said "I concur in the decision which the District Munsif has given on each point. The judgment of the lower Court is confirmed for the reasons therein set forth; and this appeal is dismissed with costs."

Held: That this was not a judgment in accordance with law as laid down in S. 574 of the Civil Procedure Code and that the Judge should re-write his judgment in accordance with the provisions of S. 574.

Per Curiam. "The judgment of the appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them."

Second appeal from the decree of the District Court of Godavari in A. S. No. 110 of 1895 affirming the decree of the District Munsif's Court of Narasapur in O. S. No. 370 of 1893.

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* S. A. No. 167 of 1897. 1st April 1898.

Sitharama Sastrulu v. Suryanarayana Sastri.

The facts of the case appear sufficiently from the judgment of the District Judge, which ran as follows :—

"Plaintiff sued for partition of family property and obtained a decree. Against this decision the 1st, 2nd and 10th defendants appeal.

This appeal is merely a reiteration of the defence that was put forward before the district Munsif. To deal with the grounds of appeal would be simply to repeat the decision which the District Munsif has given on each point. The judgment of the lower Court is confirmed, for the reasons therein set forth, and this appeal is dismissed with costs."

K. Narayana Rau for appellants

The respondent was not represented

The Court delivered the following

JUDGMENT :—We are unable to accept the judgment of the lower appellate Court as one made in conformity with the law as laid down in S. 574, Civil Procedure Code. There is no express statement of the points for determination or of the decision on such points or the reasons for the decision. All we find is a general reference to the Munsif's judgment as containing the views of the Judge. Such a general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. The judgment of the appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them. There is no indication that such was the case here. We must, therefore, reverse the lower appellate Court's decree, and direct that the appeal be restored to the file and disposed of according to law.

Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subramania Aiyar and Mr. Justice Moore.

Sri Rajah Bounnadevara ... ... Appellant * (*Plaintiff*)

v.

Putman and another ... ... Respondents (*Defendants*).

Sri Rajah Bounnadevara *v.* Putman.

Torts—Liability of agent or servant for torts committed by himself—Liability of master for torts of agent or servant.

Whoever commits a wrong is liable for it himself, and it is no excuse that he was acting as an agent or servant on behalf of and for the benefit of another. When that other person is also liable the party wronged has his remedy against both or either of them at his choice.

The plaintiff entered into a contract with one M. by which the latter was allowed to take loose stones lying on the surface of certain hills belonging to the plaintiff. In breach of this contract M. employed the defendants, his contractors, to excavate and quarry stones. The plaintiff now sued the defendants for damages sustained by him by this unlawful quarrying.

Held: That the cause of action against the defendants was one in tort and had nothing to do with the contract of the plaintiff with M. and that the plaintiff's suit should be decreed.

Second appeal from the decree of the Sessions Judge's Court Ellore in A. S. No. 517 of 1894, affirming the decree of the Court of the District Munsif of Ellore in O. S. No. 175 of 1893.

The plaintiff, the zemindar of Valloor, sought to recover from the defendants, Railway contractors, Rs. 1,000, being the value of stone alleged to have been removed by them from a hill, the property of the plaintiff. He had agreed to sell to the Railway authorities a quantity of loose stones lying on the surface of the hill. But the defendants in disregard of the agreement quarried on the hill and carried away a number of stones. The defendants admitted the quarrying, but pleaded that they had been authorized by the Railway Company to quarry. The District Munsif, and on appeal the District Judge dismissed the suit on the ground that the defendants being only agents were not liable, and that the liability,

* S. A. No. 1381 of 1896. 17th August 1898.

Sri Rajah Bounnadevara v. Putman.

if any, attached to the Railway Company alone. The plaintiff then preferred this second appeal.

C. R. Pattabhirama Aiyar for appellant.

K. Srinivasa Aiyangar for *P. R. Sundara Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—Both the lower Courts find (if we may say so, in our opinion, correctly) upon the correspondence referring to the arrangement entered into between the plaintiff (appellant) and Mr. Morrison, the Sub-Divisional Officer, on whose orders with regard to quarrying the defendants (respondents) rely, that the plaintiff had agreed to the collection and removal of loose stones only, but that he had not consented to any quarrying work being carried on on his land or to any quarried stones being taken away therefrom. It is admitted that the defendants nevertheless did quarry stone from the plaintiff's land and use the stones so quarried for their own purposes. In upholding the decree of the District Munsif dismissing the suit, the Sessions Judge gives two reasons: The first is "the general rule is that the principal and not the contractors or agents is liable civilly for tortious misfeasance. Let the superior answer for the wrong is the general principle." This is clearly an error; for it is elementary law, that whoever commits a wrong is liable for it himself, it being no excuse that he was acting as an agent or servant on behalf and for the benefit of another (Pollock on Torts, 4th Edition, page 67), and that when such other person is also liable, the party wronged has his remedy against both the tort-feasors or either of them at his (the injured party's) choice, (*Ibid*, p. 182). The Sessions Judge is equally mistaken in the second ground taken by him when he observes "the defendants being contractors under Mr. Morrison and not being parties to the original contract with the plaintiff not, I think, liable to the plaintiff." No doubt if the plaintiff were suing in respect of a breach of the contract with Mr. Morrison, the defendants who are not parties to the contract could not be sued as to such breach. The plaintiff here, however, is not complaining of breach of an obligation created by the contract. So far as he is concerned, the contract is referred to to show that the wrong done to him by the defendants is independent of the contract. In other

words, the case made out is that by quarrying and removing stones from the plaintiff's land without his permission the defendants violated a duty cast upon them by law, viz., that they shall not invade his right of property.

Sri Rajah Bommadevara v. Putman.

It is manifest, therefore, that the plaintiff is entitled to recover from the defendants damages for their tort. We must, therefore, call upon the Sessions Judge to submit within one month from the receipt of this order a finding (upon the evidence on record) as to the amount the plaintiff is thus entitled to recover. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Subrahmania Aiyar.

Subrahmania Pattar ... Appellant* (*2nd Plaintiff*).

v.

Valiya Nayar and others ... Respondents (*1st Plaintiff* and *Defendants*).

Subrahmania Pattar v. Valiya Nayar.

Civil Procedure Code S. 54—Alternative prayers in plaint—Plaint insufficiently stamped—Court cannot reject without first requiring proper stamp to be paid.

The plaintiff sued to redeem a Kanom (mortgage) of 1858, and alleged in his plaint that the defendants were setting up a renewal of 1874, which was not, however, binding on the plaintiff. He paid Court fees on the amount of the mortgage admitted by him and added an alternative prayer that if the Court should find the renewal of 1874, to be valid he might be allowed to redeem on the footing of that renewal. The District Munsif decreed the suit, but the District Judge, on appeal, found that the renewal of 1874 was binding on the plaintiff and dismissed the suit, inasmuch as he had not paid Court-fees on the amount of that renewed Kanom, but only upon the kanom of 1850, which was for a less sum.

Held: That the dismissal of the suit was improper and that the proper course for the Judge was that provided for by S. 54, Civil Procedure Code, *viz.*, to require the plaintiff to pay the additional stamp necessary to cover the larger amount and, in default, to reject the suit.

Second appeal from the decree of the District Judge of South Malabar in A. S. No. 670 of 1895, reversing the decree of the District Munsif of Nedunganad in O. S. No. 138 of 1894.

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* S. A. No. 675 of 1897. 26th July 1898.

Subrahmania Pattar v. Valiya Nayagar.

This was suit to redeem a kanom of 1858 with arrears of interest. The defendants set up a renewed kanom of 1874 for an enhanced amount which kanom, the plaintiff alleged was not binding on him. The plaintiff, therefore, paid court-fees on the mortgage that he relied upon and sued to redeem the same. The District Munsif found the plaintiff's case to be true and decreed the suit accordingly on the footing of the kanom of 1858. On appeal, however, the District Judge held that the renewal of 1874 was binding on the plaintiff and dismissed the suit inasmuch as the stamp originally paid was insufficient to cover the amount of the subsequent mortgage. He said:—

"The last question is whether the plaintiffs are entitled in this suit, to redeem the kanom of 1874? The case of *Unnian v. Raman* (I. L. R., 8 M. 415), is cited for the plaintiffs and it is pointed out that in their plaint, they added an alternative prayer that in the event of the renewal of 1874 being found to be valid, they might be allowed to redeem on the footing of that document. It is urged, however, that they have not paid court-fees on this alternative relief as required by S. 17 of the Court Fees Act and the case does not fall within the provision of S. 11. It appears to me that no relief can now be granted to them on this alternative prayer, and I come to this conclusion the more readily that they have another remedy, *viz.*, to institute a fresh suit on the renewal of 1874. For the reasons already given, I find that the plaintiff's suit failed and, reversing the decree of the lower Court, direct that it stand dismissed with costs throughout."

On this judgment a second appeal was preferred.

P. R. Sundara Aiyar for appellant.

V. Krishnaswami Aiyar for 2nd to 5th and 32nd respondent.

The Court delivered the following

JUDGMENT:—We think the District Judge was wrong in refusing to allow the payment of the court-fee stamp with reference to the alternative prayer of the plaint and in dismissing the suit accordingly. The stamp paid was estimated on the footing of the mortgage of 1858, which was the only mortgage admitted by the plaintiff. The stamp amount did not cover the additional amount due under the mortgage of 1874. It was competent to the District Munsif on reading the plaint to call for the balance due. This he did not do. When the matter came up on appeal before

the District Judge, the latter might have adopted the same course and given the plaintiff time to pay the difference as required by S. 54 of the Civil Procedure Code. Except for that section, there is no provision of law entitling the District Judge to reject the suit unconditionally on account of the defective court-fee stamp.

Subrahmania Pattar v. Valiya Nayar.

We must reverse the decree and direct the District Judge to give an opportunity to the plaintiff to pay the difference in Court stamp within a time fixed. The District Judge will, on the duty being paid, have to determine in what terms with reference to the mortgage of 1874, the redemption is to take place and to give a decree accordingly. If the court-fee is not paid within the time fixed, the plaint should be rejected.

As to costs, we direct appellant to bear his own costs of the appeal. Other costs to be provided for in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar, and Mr. Justice Benson.

Veerabadhrappa Chetty ... Appellant* (*Counter-petitioner*)

v.

Chinnammah ... ... Respondent (*Petitioner*).

Civil Procedure Code, S. 158—Costs, failure to pay.

Where at the request of a petitioner the Court adjourns the case ordering him to pay the costs of adjournment to the counter-petitioner and the former does not pay it, the Court cannot dismiss the petition under S. 158 C. P. C. unless it had made the payment of costs a condition precedent to hearing the evidence in the case.

Veerabadhrappa Chetty v. Chinnammah.

Appeal from the order of the District Court of North Arcot, in M. P. No. 600 of 1895.

A widow applied for a succession certificate. The brother of the deceased man opposed it. On the fixed date of hearing, the counter-petitioner not being ready asked for an adjournment. An adjournment was granted and the counter-petitioner was ordered to pay the costs to the other party. The costs were not paid and

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* A. A. O. No. 59. 18th December 1897.

Veerabadhrappa Chetty v. Chinnammah.

the Court disposed of the case under S. 158 of the Civil Procedure Code.

T. S. Tyagaraja Aiyar for appellant.

H. Raghavendra Rao for respondent.

The Court delivered the following

JUDGMENT:—So far as appears from the record, the District Judge seems to have dismissed the petition under S. 158 of the Code of Civil Procedure, on the ground that the costs which the counter-petitioner (appellant before us) had been ordered to pay had not been paid. Such costs would ordinarily be recoverable in execution, and, in the absence of a specific order making their payment a condition precedent to hearing the counter-petitioner's evidence, the counter-petitioner's failure to pay would not render S. 158 applicable.

We must, therefore, set aside the order of the District Judge and direct that the petition be restored to the file and be dealt with according to law. Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Davies.

Sreeman Shadagopa Srinivasaswami ... Appellant* (*Defendant*)

v.

Ramanuja Chariar and another ... Respondents (*3rd* and *4th Plaintiffs*).

Sreeman Shadagopa Srinivasaswami v. Ramanuja Chariar.

Trust, religious—Suit by disciples for appointment—Maintainability of.

Where in the case of a religious institution plaintiffs alleged that the rule of succession upon the death of the head of the institution without appointment of a successor was for the disciples to meet and elect a duly qualified person to succeed, a suit by some of the disciples having obtained leave under S. 30, but without any allegation as to why no appointment was made by the disciples, for the appointment by the Court of a proper person and for possession being given to such person of the properties of the institution from the defendant, alleged to be a trespasser, is not maintainable.

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* A. No. 62 of 1897. 2nd August 1898.

Sreeman Shadagopa Srinivasaswami v. Ramanuja Chariar.

Appeal from the decree of the District Court of Chingleput in O. S. 11 of 1891.

Plaintiffs who were some of the disciples of the Ahobalam Mutt of Trivellore, alleged that the last rightful Jeer of the mutt died in 1888 without appointing a successor, that the defendant trespassed upon the mutt and without any lawful appointment got himself installed as Jeer and took possession of the mutt properties. The plaintiffs prayed for the appointment by the Court of a duly qualified person or by election by the disciples under the orders of the Court, for the removal of the defendant from the possession of the mutt properties and for delivery to the person so appointed of the said properties. The District Judge decreed the plaintiff's claim for appointment of a person by the disciples under the orders of the Court. The defendant who contended that he was the rightful Jeer preferred this appeal.

E. Norton, C. Ramachandra Rao Saheb, V. Krishnaswami Aiyar and T. V. Seshagiri Aiyar for appellant.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—In our opinion the plaintiffs have entirely misconceived their rights. Their case is that no successor has been appointed in place of the deceased Jeer. They ask for a declaration that the defendant is not the duly appointed successor; they pray that the Court may be pleased to appoint a successor or cause one to be elected according to usage; and they ask that the property be delivered up to the person so appointed.

In the plaint, it is alleged, that the disciples should, when no successor has been appointed by the Jeer before death, meet and select a proper successor, and the defendant agrees that this is the custom.

No reason is suggested why the disciples, whom the plaintiffs represent, should not have met and made their selection. There was thus no authority for them to come to the Court to assist them in making the appointment. They might have made an appointment and allowed the appointee to bring a suit for ejectment, if

Sreeman Shadagopa Srinivasaswami *v.* Ramanuja Chariar.

necessary. It is quite clear that the plaintiffs are not entitled to a mere declaration (*Srinivasa Aiyangar* v. *Srinivasaswami*, I. L. R., 16 M., 31) and they cannot be more entitled, because an unnecessary prayer for an appointment by the Court is added.

In the cases cited, we must assume that there were circumstances which made it impracticable for the person having the right to appointment to exercise that right and thus entitled them to come to the Court. In those cases, moreover, the decree was drawn up in such a way as to preclude the possibility of another suit.

In the present case, as the decree stands, it will apparently remain open to the defendant to take objection to the appointment which is made under the decree—and thus another suit may be required, whereas, if the suit were brought by a person appointed by the disciples, the whole dispute might be decided in one suit. Nothing has been done on the decree, though it is now nearly two years old, and it is ten years since the vacancy occurred. The reason probably is that the respondents know they cannot obtain a majority.

We reverse the decree and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice.

Baluswamy ... ... Appellant* (*Petitioner Plaintiff*)

v.

Lakshmanan and others ... ... Respondents.

Civil Procedure Code Ss. 244 and 318—Decree-holder auction-purchaser—Agreement between auction-purchaser and judgment-debtor not to take possession of property—Question arising in execution of decree. Baluswamy *v.* Lakshmanan.

Where a decree-holder himself purchases the judgment-debtor's property in execution, and after such purchase enters into an agreement with the judgment-debtor not to take possesion of the property for consideration received:—

Held that in an application by such auction-purchaser under S. 318 of the Civil Procedure Code, to be put in possession, the validity or otherwise of the agreement can be enquired into and decided as a matter arising in execution under S. 244, Civil Procedure Code.

Muttia v. *Appasami*, I. L. R., 13 M., 504, followed.

Civil miscellaneous second appeal from the order of the District Court of Madura in C. M. A. No. 15 of 1896, reversing the order of the District Munsif of Madura in M. P. No. 31 of 1896 in O. S. No. 634 of 1890.

Plaintiff obtained a hypothecation decree against the defendants in O. S. No. 634 of 1890 in the District Munsif's Court of Madura. In execution of it he became purchaser. In May, 1893, he entered into an agreement with the defendants not to take possession of property on payment of Rs. 1,100. In spite of this agreement he applied, under S. 318, Civil Procedure Code, for removal of obstruction and to be put in possession. The defendants set up the agreement and pleaded payment under it. The Munsif found that the discharge pleaded was not true and ordered delivery. On appeal, the District Judge found that money had been paid under the agreement in question and ordered the delivery to be set aside. The plaintiff then preferred this second appeal and contended that the defendants' only remedy was a suit to enforce the alleged agreement and that an executing Court had no power to enter into such matters.

* A. A. A. O. No. 20 of 1897. 16th August 1898.

Baluswamy v. Lakshmanan.

T. Rangachariar for appellants.

S. Gopalasami Aiyangar for respondents.

The Court delivered the following

JUDGMENT:—I am asked to say that a purchaser who was also decree-holder may, in defiance of his own agreement, insist on an order under S. 318. It is clear to my mind that the Judge intended to find that there was an agreement between the parties and that under it Rs. 1,100 had been received by the purchaser. The case cited (*Muttia* v. *Appasami*, I. L. R., 13 M., 504) is an authority against the purchaser, for it shows that an agreement like the present may bind him.

I dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice.

Changa Ram ... ... Petitioner * (*Plaintiff*)

v.

Narayani Ammal and others ... Respondents (*Defendants*).

Changa Ram v. Narayani Ammal.

S. 315, Civil Procedure Code—Right of auction-purchaser to recover purchase-money in a suit—Previous application in execution to recover purchase-money—Suit not barred unless previous application makes matter *res judicata*.

An auction-purchaser whose sale has been set aside may recover his purchase-money in a regular suit, although he might have, previous to the suit, ineffectually made an application under S. 315, Civil Procedure Code, provided that the matter has not been decided in that prior application.

(*Munna Singh* v. *Gajadhar Singh*, I. L. R., 5 A. 582, referred to—vide *Sundara Gopalan* v. *Venkatavarada Aiyangar*, Ib. 17 M., 228.)

Petition praying the High Court to revise the decree of the Subordinate Judge's Court of Calicut in S. C. Suit No. 185 of 1897.

The facts necessary for the purposes of this report appear sufficiently from the judgment of the Court.

V. Ryru Nambiar for petitioner.

P. R. Sundara Aiyar and *T. M. Appu Nedungadi* for respondents.

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* C. R. P., No. 411 of 1897. 18th August 1898.

Changa Ram v. Narayani Amma.

The Court delivered the following

JUDGMENT:—The point which I took time to consider was, whether an auction-purchaser having ineffectually made an application under S. 315 of the Civil Procedure Code, may afterwards bring a suit to recover the purchase-money. It appears that the application for repayment of the purchase-money made after the sale of the property was set aside was dismissed on the ground of limitation. It is said that it was wrongly dismissed, but the point is not material, because it is not suggested that the present suit is barred by the law of limitation.

I was inclined to think that the plaintiff having elected to proceed by application could not subsequently have recourse to a regular suit, and *Stuart*, C.J., in the case cited (*Munna Singh* v. *Gajadhar Singh*, I. L. R., 5 A. 582) seemed to have entertained that opinion. It certainly is not convenient that a purchaser should be at liberty to vex the judgment-creditor by adopting, first, one of the remedies, and then, the other. In a case, however, like the present in which the claim has not become *res judicata* in the first proceeding, I do not see on what principle the purchaser can be prevented from instituting another proceeding. Here the application led to nothing; there was no decision of any question arising in the suit. It may have been open to question whether, since the right to recover the purchase-money is a creature of the Code, any remedy other than that indicated in the Code was intended to be available to the purchaser.

It has been decided that a suit is maintainable, and this being so, I do not think the right to sue can be affected by the circumstance that a prior application has been made, unless in that application the matter has been made *res judicata*.

I think the decree of the Subordinate Judge must be reversed, and he must be directed to decide what sum is recoverable and from which of the defendants and to pass a decree accordingly.

I give the petitioner costs of this application. Other costs, the Subordinate Judge will deal with.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Mayandi Chetti ... ... { Appellant (*Plaintiff*)

v.

Mrs. Oliver, and others ... ... Respondents (*Defendants*).

Mayandi Chetti *v.* Mrs. Oliver.

Indian Evidence Act, Ss. 91, 92, proviso 4—"*Oral* agreement", meaning of—Agreement in writing registered, variation of.

The expression 'oral agreement' in S. 92 of the Indian Evidence Act is intended to cover all unwritten agreements, whether come to by word of mouth or implied by conduct or otherwise.

The defendant had taken a lease of certain lands belonging to plaintiff under a registered instrument of 1878, which prescribed an annual rent of Rs. 106. This rent was being paid till 1886, and from that time till the institution of the suit in 1895, only Rs. 50 were paid and accepted as the rent payable per annum. In a suit by plaintiff for rent according to the rate prescribed in the registered instrument:

Held: that any variation of it by subsequent conduct cannot be proved and that the plaintiff was entitled to the relief claimed.

Second appeal from the decree of the Subordinate Judge's Court of Tanjore in A. S. No. 565 of 1896, affirming the decree of the Court of the District Munsif of Negapatam in O. S. No. 445 of 1895.

The facts of the case appear sufficiently from the judgment of the Court.

V. C. Desikachariar for *P. R. Sundara Aiyar* for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The late Mr. Oliver, whom the respondents (defendants) represent, took in 1878 a lease of certain land vested in the temple represented by the appellant (plaintiff) under Exhibit A a registered instrument, the annual rent reserved thereunder being Rs. 106-4-0. In 1886 Mr. Oliver requested the then trustee of the temple to agree to a reduction of the rent to Rs. 50 per annum. The trustee agreed accordingly, but the agreement was not reduced to writing. From that time up to the institution of

* A. A. No. 991 of 1897. 9th August 1898.

Mayandi Chetti *v.* Mrs. Oliver.

this suit in 1895, Rs. 50 only were paid and accepted as the rent payable per annum. The lower Courts in effect held that the respondents were not precluded by proviso 4 to section 92 of the Evidence Act, from proving the agreement to modify the terms of the registered lease in so far as the amount of rent was concerned. In supporting the decision of the lower Courts, the learned vakil for the respondents contended, if we understood him correctly, that in cases like the present though no *express oral* agreement rescinding or modifying the terms of a written instrument could be proved, yet that an agreement to be implied from the acts and conduct of the parties could be proved and apart from the express agreement of 1886 between Mr. Oliver and the then trustee an agreement to take rent at only Rs. 50 might and ought to be inferred from the acceptance of rent at that rate for a period of about 10 years, the decree of the lower Courts should be upheld. But we are unable to concur in the view that an unwritten agreement implied from the acts of the parties is not an oral agreement within the meaning of the proviso since we are of opinion that the word "oral" therein is used in the sense of not committed to writing, and therefore the words 'oral agreement' cover all unwritten agreements, whether come to by word of mouth or otherwise.

The decree of the lower Courts must, therefore, be modified by allowing the plaintiff's claim according to the rate due under the registered lease (Exhibit A). In the circumstances of the case, we direct the parties to bear their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice.

Muruga Pillai ... ... Appellant* (*Defendant*)

v.

Subrahmania Aiyar ... Respondent (*Plaintiff*).

Muruga Pill *v.* Subrahmani Aiyar.

Civil Procedure Code, S, 13—Joinder of causes of action closely connected—Settlement of accounts, suit on—Suit on pro-note given on settlement of account.

The plaintiff first sued on a pro-note executed to him by the defendant for money due on a settlement of accounts and alleged that the pro-note was contained in the plaintiff's account book stamped and signed by the defendant. The defendant

* A. A. O. No. 16 of 1898. 7th August 1898.

Muruga Pillai v. Subrahmania Aiyar.

denied execution and the suit was dismissed on the ground that the plaintiff failed to prove the genuineness of the pro-note. The plaintiff then sued the defendant on the settlement of accounts.

Held :—That the second suit was barred by S. 13 of the Civil Procedure Code. *Arunachalam Chetty* v. *Meyyappa Chetty*, I. L. R., 21, M., 91, followed.

Appeal from the remand order of the Subordinate Judges' Court of Tanjore in A. S. No. 334 of 1897, presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 196 of 1895.

This was a suit to recover from the defendant Rs. 659-8-0, being the principal and interest due on the settlement of accounts signed by the defendant on the 22nd November 1892 and Rs. 563-13-0 principal and interest due on an account running from the 24th November 1892 to 4th March 1893 as per day book and ledger kept in plaintiff's shop. The plaintiff had previously sued the defendant for the same accounts alleging that on his settlement of accounts on the 4th March 1893, a balance of Rs. 1,000 was found due to the plaintiff and that the defendant had acknowledged and promised to pay the same with interest at 24 per cent. per mensem. This acknowledgment was in the plaintiff's ledger and was stamped and purported to be signed by the defendant. As there was a promise to pay, the plaintiff had sued on the acknowledgment as if it were a pro-note. In that suit the defendant denied the execution of the pro-note as well as the settlement of accounts, and the suit was dismissed on the ground that the plaintiff had failed the prove the execution of the pro-note set up, though the settlements of accounts of the 22nd November 1892 and the subsequent dealings up to the 4th March of 1893 were all found to be true. The plaintiff then brought the present suit on the accounts. The Munsif dismissed the suit as barred by S. 13, Civil Procedure Code. The Sub-Judge on appeal reversed the Munsif's judgment and remanded the case for disposal on the merits. The plaintiff then preferred this second appeal.

P. S. Sivaswami Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—I think the Judge is wrong. The two claims, the one on the note, the other on the settlement of accounts, are so

closely connected that I do not think it can possibly be said that the plaintiff ought not to have joined the two claims. He might have joined them and I think he ought to have done so. The evidence in support of the two claims would be in great part the same. In both cases, proof of entries in the books would be necessary. Having regard to the terms of S. 13, Civil Procedure Code, as construed by the Privy Council and in this Court, *Arunachalam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M., 91, I think the suit was rightly dismissed.

Muruga Pillai v. Subrahmania Aiyar.

The order of remand is set aside with all costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Narayanamma and others ... ... Appellants (2, 3 and 4 *petitioners*

v.

Ramayya Chetti ... ... Respondent (*counter-petitioner*).

Civil Procedure Code, S. 253—Liability of person becoming liable, pending suit—Decree not executable against surety.

Narayanamma v. Ramayya Chetti.

Where, pending a suit, a person executes a security-bond to the Court under which he guarantees the production by the defendant in the suit of certain debt-bonds whenever called upon to produce them and agrees on failure thereof either himself to produce them or pay their value:—

Held: that the security bond thus executed does not fall under S. 253, C. P. C., and that a decree passed in favour of the plaintiff in the suit cannot be executed against such a surety under that section.

Appeal from the order of the District Court of Cuddapah in C. M. P. No. 317 of 1897.

Plaintiff brought O. S. 60 of 1888 in the District Court of Cuddapah for partition. Pending the suit he applied for and got an order for an injunction to restrain the defendant from alienating certain properties and for an order to produce the debt-bonds and family accounts. The defendant produced the bonds in obedience

A. A. O. 173 of 97. 23rd August 1898.

Narayanamma v. Ramayya Chetti.

to the order but they were returned to her on Ramayya binding himself by his security-bond of the 21st December 1888 to produce the bonds in case the defendant failed to produce them or pay the amount for which the bonds stood. The bond ran as follows.

"Whereas the Court has returned back into the possession of Penupur Nagamma, defendant in this suit, the bond of the aggregate value of Rs. 7,290-1-0 produced by the said Nagamma in Court on the 20th instant, in pursuance of the Court's order in M. P. No. 290 of 1888 on the file of this Court, I hereby bind myself to produce either those bonds or the value of those bonds in case this defendant Nagamma fails to produce them on the service of a notice by the Court. Moreover, if this defendant Nagamma and the debtors should in the meantime settle the accounts in the Office and return any of the documents, out of these documents, I bind myself to produce in Court also the amount received by Nagamma upon such settlement."

Plaintiff got a decree in the suit and, on the defendant dying before it can be executed against her, he applied for the execution of his decree against Ramayya under S. 253, C. P. C. The District Judge dismissed the application on the ground that S. 253 had no application to the case. The plaintiff then preferred this appeal to the High Court.

P. R. Sundara Aiyar for appellant.

K. Brown for respondent.

The Court delivered the following:—

JUDGMENT:—The wording of the bond does not in terms make the surety liable for the performance of the decree so as to bring the case clearly within the provision of S. 253, C. P. C. It is, however, contended for the appellant that S. 253 is applicable to all cases in which it may reasonably be inferred that the real intention was that the surety should satisfy the decree, notwithstanding that the bond does not expressly bind the surety to do so. As illustrations of such a liability cases of security taken under Ss. 479 and 485, C. P. C., but in which the bonds failed to charge expressly the liability of the surety in the terms of the Code were referred to. In such cases, no doubt, the circumstances under which the security was given and the manifest object of taking the security might be properly considered. But the security in

Narayanamma v. Ramayaya Chetti.

the present case was not taken under any of these provisions of the Code and we are not in a position to say that the direct object of the Court was to provide for the satisfaction of the decree. Under the terms of the bond, it was open to the Court to call upon the surety to perform his undertaking before any decree was passed and irrespective of any decree that was about to be passed. We agree with the District Judge that the case does not fall within the purview of S. 253, and the liability of the surety cannot be enforced in execution.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Paramasiva Goundan ... ... Appellant* (*Plaintiff*)

v.

Kandappa Goundan and another ... Respondents (*Defendants*).

Paramasiva Goundan v. Kandappa Goundan.

Landlord and tenant—Rent Recovery Act—Exchange of puttah and muchilika, not necessarily the cause of action—Limitation—Onus of proof on plaintiff to show that the plaint is within time—Practice—Second appeal, evidence not allowed in.

The exchange of puttah and muchilika between a landlord and his tenant is not the origin of the right of the landlord to demand his rent. It is a condition imposed by law as a necessary preliminary before the filing of a suit for rent. The cause of action for rent accrues to the landlord when the rent becomes payable according to contract or usage.

Where a landlord sues for rent and the defendants plead limitation, the landlord must prove that the suit was brought within the time allowed by law; and if the landlord fails to adduce such proof in the first Court, he ought not to be allowed to remedy the defect in second appeal.

Second appeal from the decree of the District Court of Salem, in A. S. No. 24 of 1896, affirming the decree of the Court of the District Munsif of Namakal in O. S. No. 387 of 1895.

The plaintiff, the landlord, sued the defendants, his tenants, for arrears of rent due for fasli 1301. The suit was filed on the 1st of July 1895. The defendant pleaded limitation, and the Munsif held that the cause of action arose on the 30th June 1892, the last

* S. A. No. 1031 of 1897. 30th August 1898.

Paramasiva Goundan v. Kandappa Goundan.

day of fasli 1301 and that, consequently, the suit filed on the 1st July 1895, was beyond time by a day. The plaintiff then appealed to the District Court on the ground that the 30th June 1895, the last day allowed by law was a Sunday and that, consequently, the suit filed on the 1st, July, was within time. But the District Judge held that the starting point of limitation was the date of the tender of the puttah for the fasli in question and, as the putta had been tendered on the 21st June 1892, the suit was barred by limitation. The plaintiff then preferred this second appeal and contended before the High Court that the starting point of limitation was the last day of fasli 1301, when according to custom all the kists for fasli were payable and that the suit was, therefore, not barred by limitation.

T. V. Seshagiri Aiyar for appellant.

R. Sadagopachariar for respondents.

The Court delivered the following

JUDGMENT:—The real question for decision is whether the suit for recovery of rent for fasli 1301 is barred. It is not correct to say that the landlord's right to the rent accrues only after exchange of puttah and muchilika or tender of putta. The right of the landlord to the rent is a right existing prior to, and independent of, the written engagements prescribed by the Rent Recovery Act. The exchange of puttah and muchilika or tender of puttah is a condition imposed by law as a necessary preliminary to the filing of a suit but does not affect the accrual of the cause of action for purposes of limitation in a suit like the present for arrears of rent. (See *Coburn* v. *Colledge,* 1897, I. Q. B., 702). Such cause of action accrues when the rent becomes payable according to contract or usage. It was for the plaintiff to show that the rent became due within three years prior to the bringing of his suit. He has not attempted to do so. As the defendants pleaded limitation in their written statement, the plaintiff ought to have called evidence to prove the facts necessary to show that his suit was in time. Having failed to do so, we cannot at this stage allow him to remedy the defect.

We, therefore, dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice.

Seshachalam Chetti ... ... Appellant * (2nd *Defendant, Counter-petitioner*)

v.

Rajam Chetty ... ... Respondent (*Petitioner*).

Seshachalam Chetti *v.* Rajam Chetty.

S. 230, Civil Procedure Code—Fraud of judgment-debtor preventing execution—Fraud, meaning of—Application for warrant of arrest, and application for attachment of immovable property different from each other.

In order to bring a case within the proviso to S. 230, Civil Procedure Code, it has to be proved—(1) that the judgment-debtor used stratagems designed to prevent execution of the decree, and (2) that the execution of the decree was by such means prevented.

It is not enough to prove fraud at some time during the 12 years. It must be proved that the non-execution of the decree was brought about by the fraud complained of.

Assuming that an application made before the expiration of the 12 years period, may, notwithstanding S. 230, C.P.C., be granted after the lapse of that period, still a decree-holder cannot, on account of the pending of a prior application for warrant of arrest, be allowed, after the lapse of the 12 years, to make another application for the attachment of immovable property, inasmuch as the two applications are entirely different and distinct from each other.

Appeal from the order of the District Court of Nellore, dated 17th December 1897, passed on execution petition No. 7 of 1897.

The fact of the case appear sufficiently from the judgment of the Court.

T. V. Seshagiri Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal against an order made in execution of a decree, dated the 6th of January 1885. The petition, in pursuance of which the order is made, dated the 21st January 1897, alleges that a prior application for a warrant of arrest is still in force and asks for the attachment of certain immovable property. I am clearly of opinion that such a petition on the face of it was defective and ought not to have been entertained. Assuming that

* A. A. O. No. 17 of 1898. 23rd August 1898.

Seshachalam Chetti v. Rajam Chetty.

an application made before the expiration of the 12 years period may, notwithstanding the provision contained in S. 230 of the Civil Procedure Code, be granted after the lapse of 12 years from the date of the decree, I see no reason for holding that a decree-holder can, on account of the pending of a prior application, be allowed, after the lapse of the 12 years, to make another application of a totally different sort. This is what the decree-holder by his petition seeks to do, and accordingly I think his petition should have been dismissed. But a case for avoiding the operation of S. 230 of the Civil Procedure Code, not put forward as it should have been in the petition, was insisted on in the Court below and has been made the ground for justifying the order against the judgment-debtor. The Judge in effect finds that the decree-holder was prevented by the fraud of the judgment-debtor from executing his decree. Now in order to bring the case within the proviso to S. 230, two things have to be proved. It has to be proved that the judgment-debtor used stratagems designed to prevent the execution of the decree, and that the execution of the decree was by such means prevented. As to the first point, there is a great want of precision in the judgment, and I asked the respondent's vakil in vain to explain by reference to the evidence in what respects the judgment-debtor had been guilty of fraud. The Judge says, that several adjournments were granted, and that for 12 years the judgment-debtor had very cleverly managed to put off payment of the debts. He finds that a journey to the north, spoken of by the witnesses, was undertaken with the view to elude arrest. In support of this the only evidence is that the process-servers were unable to find him. No attempt was made to prove that the debtor was aware of the threatened warrant when he left his house. The witnesses only say they heard he had gone away, and it may well be that he did travel about as a broker. But their evidence is of no importance, because it relates, as the Judge observes, to conduct after the 14th January, and what the respondent has to prove is fraudulent conduct before the 6th of January.

There being no evidence of fraud, it is hardly necessary to discuss the second point, *viz.*, whether by reason of the debtor's conduct the execution of the decree has been prevented.

It is obviously not enough to prove fraud at some time during the 12 years period, because it is quite consistent with such fraud

Seshachalam Chetti v. Rajam Chetty.

that the decree-holder may at a later period have had full facility for executing his decree. It must be proved that the non-execution of the decree was brought about by the fraud complained of. In the present case the evidence, such as there is, goes to show that it was as much the decree-holder's as the debtor's fault that no property was realized. Apparently, there was property which could be attached, and the attachment of which was in no way impeded by the debtor. The Judge does not find that execution of the decree was, in fact, prevented, and no evidence was indicated which could have led him to such a finding.

I think the respondent on whom the burden of proof lay has failed to prove the case which, as I have mentioned, he now alleged in his petition, and, therefore, I must reverse the order with all costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Venkata Narayana Reddi ... Appellant* (*Appellant*)

v.

Papayya ... ... Respondent (*Respondent*).

Venkata Narayana Reddi v. Papayya.

Mortgagor and mortgagee—Foreclosure decree—Extension of time for payment after the time mentioned in the decree—Order absolute necessary—Transfer of Property Act, Ss. 86, 87.

Where a mortgagee obtains a decree for foreclosure, it is imperative on his part to apply for and obtain a second order or order absolute for foreclosure before he can take possession of the mortgaged property so as to enable the mortgagor to pay the mortgage amount before the property is absolutely foreclosed or obtain an extension of time for such payment on good cause being shown. And where a mortgagee obtains such an order absolute without notice to the mortgagor the latter may apply to set aside the *ex parte* order and recover possession of the property after paying the decree amount or ask for an extension of time for such payment.

Civil miscellaneous second appeal from the order of the District Court of Cuddapah in C. M. A. No. 331 of 1895, affirming the order of the District Munsif of Prodattur in C. M. P. No. 758 of 1895.

A. A. A. O. No. 100 of 1897. 23rd August 1868.

Venkata Narayana Reddi v. Papayya.

The plaintiff had obtained a decree for foreclosure against the defendant, the concluding portion of which was as follows "in default of the defendant paying into Court or to the plaintiff such principal, interest and costs as aforesaid by the time aforesaid, this Court doth further order and decree that the plaintiff be entitled to recover the mortgaged property as absolutely sold for the decree amount." The decree amount was not paid within the time fixed in the decree and the mortgagee thereon applied for delivery of possession under S. 235, Civil Procedure Code. As the decree was not more than a year old the Court without issuing notice to the defendant ordered delivery to plaintiff and he was accordingly put in possession. The defendant then applied under S. 244, C. P. C., to set aside the *ex parte* delivery made to the plaintiff and for an extension of time to pay the decree amount. The District Munsif granted 2 days' further time within which the defendant paid the money and had the property restored to him. The plaintiff appealed to the District Court from the order of the Munsif granting extension of time for payment and the District Judge confirmed the order of the Munsif. The plaintiff then preferred this second appeal to the High Court.

P. R. Sundara Aiyar for appellant.

T. Ethiraja Mudaliar for respondent.

The Court delivered the following

JUDGMENT:—In a case like this a second order or order absolute, on application by the mortgagee was imperative under the Transfer of Property Act to enable the plaintiff to obtain possession of the property. On such an application being made by the mortgagee, the mortgagor (defendant) is entitled under the proviso to S. 87 of the Act to obtain an extension of time for payment of the money on showing good cause. We cannot agree with the appellant's contention before us that the mortgagor cannot apply for such extension after the expiry of the time fixed for payment in the first order inasmuch as the mortgagee himself could apply for an order absolute only after the expiry of such time. It is next contended by the appellant that even if the mortgagor could ask for an extension after the expiry of the time fixed for payment in the first order, he could not do so after the passing of the final order, and that such final order was in fact passed in the present case. That order was,

however, passed without notice to the mortgagor (defendant) who, therefore, had no opportunity of availing himself of the provision made for his benefit in the latter part of S. 87, by showing cause and obtaining an extension of time before the final order was passed and we think that as the mortgagor, as soon as he became aware of the *ex parte* order, applied to have it set aside and the order was thereupon set aside, it was competent to the Court to extend the time for payment.

Venkata Narayana Reddi *v.* Papayya.

The order of the District Judge was therefore right, and we dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Mrs. J. Foulkes ... ... Appellant *(*Defendant*)

v.

Muthusami Goundan ... ... Respondent (*Plaintiff*).

Mrs. Foulkes *v.* Muthusami Goundan.

Landlord and tenant—Pattah fixing rent "*saswathamai*" perpetually—Construction of statute—Retrospective effect, when to be given to statute.

A mittadar gave a pattah to his tenant having a heritable interest in his holding, in the year 1841. The pattah fixed the cowle at Rs. 40 a year and provided that "this sum of Rs. 40 you shall pay perpetually (*sáswathamái*) every year as per kist in the mittah cutchery and obtain receipt."

Held: that the word "*sáswathamái*" meant perpetually and that the pattah fixed the assessment permanently and for ever.

Held further that S. 11 of the Rent Recovery Act had no application to it as the Act itself was passed long after the pattah came into existence and cannot be held to have any retrospective operation in the absence of an express provision in it to that effect.

Rajaram v. *Narasinga*, I. L. R., 15 M., 199, } distinguished.
Tulshi Pershad Singh v. *Ram Narain Singh*, *Ib.*, 12 C., 117, }

Young v. *Adams* (1898 App. C. 476), referred to.

Second appeal from the decree of the Subordinate Judge's Court of Bellary and Salem in A. S. No. 91 of 1895, reversing the decree of the Court of the District Munsif of Salem in O. S. No. 790 of 1893.

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*S. A. No. 1060 of 1897. 23rd August 1898.

Mrs. Foulkes v. Muthusami Goundan.

The facts of the case appear sufficiently from the judgment of *Subrahmania Aiyar, J.*

C. R. Pattabhirama Aiyar for appellant.

R. Subrahmania Aiyar for respondent.

The Court delivered the following

JUDGMENT:—*Subrahmania Aiyar, J.*:—The first question for determination is whether under Exhibit A, the pattah, dated the 16th November 1841, granted by the appellant's father, the late Mr. George Frederick Fischer, the then owner of the Salem Mittah, to the late Narahari Iyen, a raiyat that held certain lands in the mittah, which are now in the possession of the respondent claiming through Narahari Iyen's son, Ramakrishnaiên, the annual assessment in respect of those lands, fixed at Rs. 40, instead of Rs. 103-0-5 payable till that time, was fixed in perpetuity. After setting forth certain details, immaterial for our present purpose, the pattah concludes thus: "The remainder is Rs. 103-0-5. Cowle therefor is Rs. 40; this sum of forty rupees you shall pay perpetually (*sáswathamái* is the vernacular word) every year as per kist in the Mittah cutchery and obtain receipt." The learned Vakil for the appellant, in support of his argument that the pattah should not be construed as fixing the assessment at Rs. 40 for ever, relied on *Rajaram* v. *Narasinga*, I. L. R., 15 M., 109, where the meaning of the word '*sáswatham*,' the adverbial form of which occurs in Exhibit A, had to be considered and where *Parker* and *Shephard*, JJ. held that no hereditary estate was granted under the instrument then in question, though it contained as qualifying the term *Izárá* the words "*káyam sáswatham*"—words which, in the opinion of the learned Judges, were not distinguishable from the similar expression in vogue in the North of India, viz., '*Istemarari Mukarari*' which was treated by the Judicial Committee in *Tulshi Pershad Singh* v. *Ram Narain Singh* (I. L. R., 12 C., 117) as not conveying *per se* a hereditary estate. I do not, however, think that *Parker* and *Shephard*, JJ., intended to lay down a rule, as to the meaning of the word "*sáswatham*' and its derivatives, to be applied in all cases. The decision must be taken with reference to the facts there. And the conduct of the parties, noticed in the concluding part of the judgment of *Parker*, J., would seem to have rendered almost inevitable the conclusion that the estate in that case was not hereditary. It

Mrs. Foulkes v. Muthusami Goundan.

is also necessary to point out that in considering the applicability of the above Privy Council decision to cases like the present, we ought not to overlook the important fact that the phrase "*Istemarari Mukarari*", though lexicographically importing perpetuity, has, as stated by their Lordships themselves in the case referred to, acquired a restricted customary meaning in that part of the country (I. L. R., 12 C., at pp. 129 and 130); whereas the word, *sáswathamái*", with which we are now concerned, has acquired no such secondary signification here. It is quite true, as urged for the appellant, that when land or even an interest in the land is intended to be transferred hereditarily, it is usual to indicate the intention by the use of the words "from son to grandson", "from generation to generation", or the like. In the present instance, however, there was no transfer of land or an interest in land, but only an agreement as to the rate at which assessment was to be paid in respect of lands, in which the party bound to pay the assessment admittedly already possessed a heritable estate. In such an agreement, words, usually employed in grants intended to convey an estate of inheritance, would not be used, but the more appropriate term "*sáswathamái*" found, in Exhibit A, or '*என்றென்றைக்கும்*' or other similar phrase would be employed to show that the arrangement was intended to be perpetual. And as there is nothing in the language of the rest of the document to warrant a different construction, we must give to the word in question its natural and ordinary meaning and hold that the pattah fixes the assessment at Rs. 40 permanently and for ever, and that the respondent's right under Exhibit A to object to the appellant claiming more than Rs. 44 is not affected in any way by Exhibit I, inasmuch as the latter document is not shown to have been executed under circumstances which make it binding upon Ramakrishnaien, who was then a minor.

It was next urged on behalf of the appellant that as the rate so fixed was less than what was payable upon the lands till the date of the pattah, and also less than that payable upon neighbouring lands of similar quality and description, and as such reduction in the assessment was not granted for any of the special purposes mentioned in the second proviso to section 11 of the Rent Recovery Act, VIII of 1865, the pattah should, as against the appellant as the late Mr. Fischer's successor and the present proprietor of the mittah, be held to be invalid under that proviso. But this conten-

Mrs. Foulkes v. Muthusami Goundan.

tion is obviously unsustainable for the simple reason that the pattah had been executed long before the proviso relied on was enacted. It is scarcely necessary to observe that a Statute ought not be construed retrospectively, unless in the words of *Erle*, C.J., quoted with approval very recently by the Judicial Committee in *Young* v. *Adams* (1898, Appeal Cases at p. 476), " the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment." And it is hardly necessary to add that there is absolutely nothing in the Rent Recovery Act to show that retrospective operation was intended to be given to the proviso in question. I would therefore dismiss the second appeal with costs.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Mr. H. H. Shephard, Officiating Chief Justice, Mr. Justice Davies and Mr. Justice Moore.

Manicka Gramany and another ... Appellants in S. A. No. 748 (*2nd and 3rd Plaintiffs*)

v.

Ramachandra Aiyar ... ... Respondent (*Defendant*).

Manicka Gramany v. Ramachandra Aiyar.

Rent Recovery Act, Sections 10, 12, 33, 41, 44, 69, 76, Ejectment order by Collector—Appeal—Suit to set aside order of ejectment, non-sustainability of.

By the Full Bench Mr. Davies, J., dissenting:—Where a Collector passes a judgment against a tenant under S. 10 of the Rent Recovery Act and, subsequently, under the latter part of the same section passes an order of ejectment on proof of the tenant's failure to obey the judgment, the tenant cannot question the validity of that order in a separate suit in a Civil Court.

Per *Officiating Chief Justice* and *Moore*, J. Obiter:—An order of ejectment passed by a Collector under the latter part of S. 10 is appealable to the District Judge.

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* S. A. No. 748 of 1897. 20th July 1898.

(Per *Davies*, J.) An order of ejectment passed by a Collector under the latter part of section 10 is not a judgment and not appealable. A separate suit to set aside such an order does lie in a Civil Court.

Manicka Gramany *v.* Rama-chandra Aiyar.

Second appeal from the decrees of the District Court of Chingleput in A. S. No. 355 of 1896, presented against the decrees of the Court of the District Munsif of Chingleput in O. S. No. 82 of 1895, respectively.

This second appeal and the memoranda of objections coming on for hearing on Thursday, the 9th day of December 1897, before their Lordships the *Chief Justice* and Mr. *Justice Shephard*, their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH.

The question is one of some importance and difficulty. There are, on the one hand, cases to the effect that an order under section 10 of the Rent Recovery Act is not appealable. On the other hand, there is the decision in I. L. R., 9, M. 39, to the effect that a suit will not lie.

We refer to the Full Bench the following question, viz. :—

Whether the plaintiff who has been ejected in pursuance of an order passed under section 10 can maintain a suit to question the legality of that order?

C. Krishnan for appellants.

P. R. Sundara Aiyar for respondent.

The Court expressed the following

OPINIONS:—*The Officiating Chief Justice*:—The question we have to decide is whether a tenant, against whom a judgment has been properly passed by the Collector under S. 10 of the Rent Recovery Act, can in a separate suit in a Civil Court call in question the order of ejectment which under the same section the Collector has passed on proof of the tenant's failure to obey the judgment?

In the case *Ragava* v. *Rajagopal*, reported in I.L.R., 9 M., it was decided by a Divisional Bench that such a suit would not lie. Doubt has been thrown on that decision in recent cases, and we have accordingly to consider whether the decision was right. S. 10 of the Rent Recovery Act gives the Collector jurisdiction to decide with regard

Manicka Gramany v. Ramachandra Aiyar.

to the propriety of any puttah which the tenant to whom it has been tendered has refused to accept. The Collector has to say whether the puttah tendered was a proper one and if he holds that it was not, he has to decide in what respects it should be modified. By way of giving effect to the judgment of the Collector the section further empowers him on proof of default by the tenant to pass an order for ejecting him. It has been held with regard to this section that the jurisdiction exercised by the Collector under it can likewise be exercised by a Civil Court, except that it is not competent to the latter to amend the puttah tendered and direct the acceptance of the puttah so amended (*Ramayyar* v. *Vedachalla*, I. L. R., 14 M., 441). It has also been held that the judgment given by the Collector under the section with reference to the puttah of one fasli does not conclude the parties when in a Civil Court a dispute arises between them as to the puttah for another fasli (*Ramayyar* v. *Tirtasami*, I. L. R., 7 M., 61). The contention of the plaintiff in the present case is not supported by either of these decisions, because here what the plaintiff desires is to undo the act which an official, properly empowered in that behalf, has caused to be done to his prejudice.

The Legislature having authorised the Collector to give a judgment and to give effect to that judgment in a certain way, we are asked to say that a Civil Court may set aside the Collector's order in execution and deprive the landlord of the practical result of the judgment in his favour. This appears to me a strange proposition. It is not suggested that the judgment itself can, so far as the particular fasli is concerned, be questioned in the suit which, if no summary suit had been brought, might have been instituted in a Civil Court. Against the judgment of the Collector, there is clearly a right of appeal to the District Court under S. 69 of the Act. But it is argued that, as no such right of appeal is given against the Collector's order of ejectment, it must be intended that this order should be examinable in a Civil Court. It is by no means clear to my mind that the judgment mentioned in S. 69 does not include the order mentioned in S. 10. It would seem from other sections of the Act that the word is not used in the limited sense which in recent times it has come to bear. But however this may be, I think we should be defeating the object of the Legislature if we held that the tenant affected by an order passed under

Manicka Gramany v. Rama-chandra Aiyar.

S. 10 could obtain the reversal of that order in a Civil Court. If that had been the intention of the Legislature, one would have expected special provision to be made for it as there is in S. 32 and 44 of the Act. The language used in S. 76 is somewhat ambiguous; but I am strongly inclined to think that section indicates the intention of the Legislature to make the judgment and order of the Collector final except in the cases specially provided for.

For these reasons, I think the decision in *Ragava* v. *Rajagopal*, I. L. R., 9 M., ought to be followed. In my opinion, it is not inconsistent with *Ramayyar* v. *Tirtasami*, I. L. R., 7 M., 61.

The facts in the more recent case *Gangaraju* v. *Kondireddisami*, I. L R., 17 M., 106, are materially different from those of the present case, for the plaintiff claimed there to be owner and did not admit that he had ever held as tenant of the defendant by whom he had been ejected. There was, therefore, a question of title raised in the Civil suit, whereas here there is no such question. For these reasons, I answer the question in the negative.

Davies, J.:—The question referred to us is whether a plaintiff who has been ejected in pursuance of an order passed under S. 10 of the Rent Recovery Act—Madras Act, VIII of 1865—can maintain a suit to question the legality of that order. I think the ruling in *Gangaraju* v. *Kondereddiswami* I. L. R., 17 M., 106, that such a suit does lie is correct and should be followed. A suit for ejectment is one on title, and title can only be tried incidentally by the Revenue Courts as held in *Ramayyar* v. *Tirtasami*, at I. L. R., 7, M. 61, and approved of in *Gangaraju* v. *Kondireddiswami*. It is pointed out by the learned Judges who tried the latter case that the above point was not observed by the Judges who tried *Ragava* v. *Rajagopal* (*Kummarasamy* v. *Nallakunnu* I. L. R., 9, M., 39). Moreover, the fact is that, according to a uniform course of decisions, no appeal lies against the summary order of ejectment passed under S. 10. Appeals lie only when there has been an ejectment by the Collector in a summary suit under the Act (see 5, M. H. C. R. 293). It would seem to follow that a suit being the only remedy a suit should be allowed. It is contended that S. 76 of the Act bars a suit; but the High Court has never yet read

Manicka Gramany v. Ramachandra Aiyar.

it in that light, or it could not have allowed the many suits that it has allowed. The section reads that 'in proceedings under this Act no judgment of a Collector, and no order passed by him after decree and relating to execution thereof, shall be open to revision otherwise than by appeal to the Zillah Court, except as allowed in S. 58'. From the reference to S. 58 which provides for revision of certain of his own orders by the Collectors, it seems to me clear that the prohibition against revision in the section applies only to revision by the Collector himself. If it had been intended that no suit should lie against any judgment or order of the Collector express words to that effect would have been enacted.

Another reason that I would give for holding that a suit is maintainable is that an order for ejectment passed under section 10 is, in my opinion, an order passed by the Collector not in his judicial but in his executive or ministerial capacity as the instrument or agent of the landholder. It is just in this way that the Collector acts in the other case where he issues an order of ejectment under S. 41, and also in several other instances mentioned in the Act. S. 12 confirms this view, as it treats the ejectment under S. 10 as well as that under S. 42 as an ejectment made by the landholder. But it is not worth while to discuss the question further as the present Act is happily moribund and our ruling in the present case will not be required for future guidance. So far as the present case is concerned, I would answer the question referred to us in the affirmative.

Moore, J.:—The question referred to the Full Bench for decision is the following :—" Whether the plaintiff who has been ejected in pursuance of an order passed under S. 10 (Act VIII of 1865, Madras) can maintain a suit to question the legality of that order"?

The Madras cases referred to at the hearing are the following : —5, M. H. C. R. 293; *Ramayyar* v. *Tirtasami,* I. L. R., 7, M. 61; *Ragava* v. *Rajagopal, Ib.* 9, M. 39; *Ramayyar* v. *Vedachalla, Ib.* 14; M. 441; *Gangaragu* v. *Kondireddiswami, Ib.* 17, M. 106; and *Rangayya Appa Rau* v. *Ratnam, Ib.* 20, M. 392. It does not appear to me to be necessary to refer to the cases from other Presidencies, to which allusion has been made, as it cannot be held that they have any bearing on the question under consideration.

The decision in 5, M. H. C. R. 293 throws no light on the present case as it relates to certain proceedings taken by the Civil and Revenue Courts in connection with warrants issued under S. 41 of Act VIII of 1865, Madras. The point decided in I. L. R. 7, M. 61 was that a decision in a Revenue Court directing a tenant to accept a puttah for one fasli did not bar suit before a Civil Court in a subsequent year to determine if the rates mentioned in the puttah were proper. This ruling does not affect the present case. The question at issue in I. L. R. 14, M. 441, was as to whether a Civil Court could entertain a suit to enforce acceptance of puttah and execution of muchilika. With this question we are not now concerned. What was held in I. L. R. 17, M. 106, was to the effect that a decision of a Revenue Court that a party was bound to accept a puttah for certain land was no bar to a suit subsequently brought by him in a Civil Court to declare that he was the actual owner of the land. This is not the question now at issue. In I. L. R. 20, M. 392, it appeared that in a suit before a Revenue Court it was decided that a puttah was a proper one and it was held that this decision did not render the question of the propriety of the *puttah res judicata* in a subsequent suit in a Civil Court. With this question we are not now concerned.

I. L. R. 9, M. 39, remains for consideration. There, the High Court decided that a Revenue Court having ordered a tenant to be ejected under S. 10 of Act VIII of 1865, on the ground that he had refused to accept a puttah, as directed by the Court, a suit would not lie in a Civil Court to set aside the order of the Revenue Court. This decision has never been overruled. I. L. R. 17, M. 106, which the District Munsif was of opinion overruled I. L. R. 9, M. 39, decides, as has already been pointed out, a completely different question. It is clear that if the ruling in 9, M. is to be followed, the answer to the question referred must be in the negative, although it should be pointed out that in that decision Mr. Justice *Parker* observes that it may be that a suit would lie to set aside an ejectment irregularly obtained and that in the present case the finding of the District Judge is that the proceedings in ejectment were most irregular.

I am of opinion that the question referred must be answered in the negative, but for reasons different from those given in I. L. R.,

Manicka Gramany v. Ramachandra Aiyar.

9, M. 39. The order now under cosideration is an order of ejectment issued by a Revenue officer under the last clause of S. 10 in execution of the decree in a judgment passed by him. S. 76 of the Act clearly provides that no order passed by a Collector after decree and relating to execution thereof shall be open to revision otherwise than by appeal to the Zillah (District) Court, except in a case which does not now arise. A good deal has been said at the hearing as to the meaning of the word "revision" in this section. It appears to me that this word is here used in the widest possible sense and that the meaning of this sentence is that no order of a Collector in execution was to be set asde or interfered with in any way except by an appeal to the District Judge. There do not appear to me to be any grounds for supposing that by the word "revision" here the Legislature meant "revision" as provided for in Chapter XLVI of Civil Procedure Code.

It has been stated here at the hearing of this reference that it has always been held that there is no appeal from an order passed under the last clause of S. 10. It is, however, admitted that there is no reported decision of the High Court to that effect. It is, in my opinion, clear that the Legislature intended that there should be such an appeal. I cannot possibly hold that the meaning of S. 76 is that an order of a Collector passed in execution of a decree of his Court cannot be set aside except by an appeal to the District Judge, but that no such appeal is to be entertained. No reference to this section is made by the Judges in I. L. R. 9, M. 39.

The view, therefore, that I take is that an order of Collector ejecting a tenant under S. 10 is open to appeal to the District Judge, but that in view of the provisions of S. 76 of the Act it cannot be set aside otherwise, and I would, accordingly, answer this reference in the negative.

[The second appeal and the memoranda of objections were dismissed with costs.]

closure or sale in the alternative is or could be made. The Article applicable must, therefore, be 132 and under that, the suit is undoubtedly barred. Nilakanta Rotho v. Gongapani Panda.

We must, therefore, reverse the decree of the Court below and dismiss the plaintiffs' suit with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Rajah of Venkatagiri ... ... *Plaintiff**

v.

Sheik Bade Saheb and another ... ... *Defendants.*

Landlord and tenant—Limitation Act, S. 19—Promise to pay in muchilika amounts to acknowledgment. Rajah of Venkatagiri v. Sheik Bade Saheb.

A ryot in a Zemindari bound under the Rent Recovery Act to exchange patta and muchilika executed a muchilika to his landlord on the 25th June 1895 for the fasli ending with the 30th June 1895. The muchilika contained a promise by the ryot to pay the rent due for the fasli in instalments on certain specified dates (*viz.*, 15th August 1894, 30th October 1894 and 30th January 1895) which had already expired at the time of its execution. The rent was not paid and the landlord then filed a suit against the ryot on the 21st February 1898 for its recovery.

Held:—That having regard to the fact that, except in very rare instances, these muchilikas are not the source of the obligation to pay rent but only records of the terms and conditions of liability established by antecedent contracts or by long prevalent usage—the muchilika in question is to be construed as an admission that the instalments fell due on the dates mentioned therein and as an acknowledgment of liability to pay such part of them as had not already been paid and that the suit was therefore not barred by limitation.

Per *Subrahmania Aiyar*, J:—The promise in the muchilika may be treated as a promise to pay within a reasonable time from the date of the muchilika.

Doe-Darlington v. *Ulph* (132. B. 204); *Hall* v. *Cazenove* (4 East 477), referred to.

Per *Benson*, J. In regard to instalments not due prior to the exchange of patta and muchilika the promise must be regarded as an acknowledgment that the instalments will become payable on their due dates and as a promise to pay the same on such dates.

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*Referred Case No. 17 of 1898. 3rd August 1898.

Rajah of Venkatagiri. v. Sheik Bade Saheb.

Case stated under section 617 of Act XIV of 1892 by the District Judge of Nellore (at the instance of the District Munsif of Kanigiri) in his letter, dated 16th April 1898 No. 387, Civil.

The facts of the case appear sufficiently from the opinion of *Subrahmania Aiyar*, J.

V. Bhashyam Aiyangar and *V. C. Desika Chariar* for plaintiff.

The defendants were not represented.

The Court delivered the following

JUDGMENTS :—*Subrahmania Aiyar*, J.—This is a reference in a suit by the Raja of Vencatagiri against a ryot, holding certain lands in the Zemindari, for the rent due for fasli 1304 ending with 30th June 1895. The rent was payable in instalments and admittedly they became due on the 15th August 1894, 30th October 1894 and 30th January 1895, respectively. The present suit was instituted on the 21st February 1898. The suit is clearly barred, unless, as contended for the plaintiff, the muchilika, executed by the defendant to the plaintiff on the 25th June 1895 contains an acknowledgment such as is required by section 19 of the Limitation Act. The question for determination is whether it contains such an acknowledgment. It is to be observed that the language employed in the muchilika amounts to more than a mere acknowledgment. There is a distinct promise to pay. But the promise as such in the muchilika is obviously void on account of the inconsistency in its terms manifest in the very face of it. For the defendant promised on the 25th June to pay rent on three dates which had already expired, *viz.* 15th August and 30th October 1894 and 30th January 1895. Some observations, made by *Lord Ellenborough*, C. J., in *Hall* v. *Cazenove* (4 East 477) where a similar point arose, may be referred to here. In that case a charter-party not executed until the 15th March contained a covenant by the owner that the ship should and would proceed from a certain port, where she then lay on the 12th February preceding on her outward bound voyage. In dealing with this term of the contract the *Chief Justice* said: 'But here when the deed was executed or concluded by the delivery, the stipulation, which was not impossible in its nature when the deed was first framed, had become impossible as between

these parties from the time having passed. The stipulation, therefore, had then become wholly nugatory and cannot be understood as having formed any part of the contract between the parties without imputing to them the most manifest absurdity" (4 East at 482).

Now in construing written instruments, which admit of more than one interpretation, that interpretation which leads to an absurd result frustrating the general intention of the parties must give way to an interpretation that would carry out that intention. The muchilika, so far as we are here concerned, could be construed so as to avoid any absurd conclusion in one of two ways. The first is that suggested by the view taken by an eminent Judge in *Doe Darlington* v. *Ulph* (13 Q. B. 204). There a lease for years to commence at Michaelmas 1845 which was, by a decree for specific performance at the instance of the lessee, executed on the 12th January 1847 bearing date as of the 29th September 1845, contained a covenant to insure the demised premises, and keep them insured during the term, and a power of re-entry on breach. The landlord brought an action in ejectment and proved that the premises were not insured until the 18th February 1847.

Lord Denman, C. J., *Coleridge* and *Wightman*, J.J. dealt with the case on the assumption that the covenant might be construed as a covenant to insure within a reasonable time *only* after the execution of the deed. They did not, however, express any decided opinion on the question whether that assumption was correct. But *Patterson*, J., went further and said, "I cannot think that the defendant was bound by this covenant to keep the premises insured before the lease was actually executed; for till then there was nothing to oblige him to do so. I think if he had insured the premises shortly after the execution, he would have complied with his covenant. In all covenants to do an act in future the covenantor must have some time to perform it. It is impossible, for instance, for a man to insure the very next moment after he has entered into a covenant to do so; and if no time is expressed, he must have a reasonable time in which to do it." (*Ib.* 208). These observations would seem to warrant the promise in the present case to pay in the three dates before mentioned being treated as a promise to pay

Rajah of Venkatagiri v. Sheik Bade Saheb.

within a reasonable time from the date of the muchilika. This interpretation if admissible is less satisfactory than the second, and the only other interpretation which the language of the instrument is susceptible of, *viz.*, that it amounts merely to an acknowledgment of liability. For according to the one construction certain material words found in the instrument have to be completely rejected on the ground that, in the circumstances, they are meaningless, while effect is given to those words by accepting the view that they refer to the dates when certain instalments were payable and treating the words of promise as, in effect, an admission of executant's liability in respect of those instalments. That this construction, suggested for the plaintiff, is the sounder appears also from two other equally important circumstances bearing on the matter. One is that muchilikas, such as the present, differ materially from contracts in the strict sense of the term, that is, engagements entered into by parties who are free to enter into them or not as they choose, inasmuch as, except where by mutual consent an exchange of putta and muchilika is dispensed with, persons, in the position of the plaintiff and the defendant here, are under a legal duty to interchange such documents periodically—a duty enforcible specifically. The other circumstance is that although occasionally muchilikas like the present may contain terms truly contractual, as when in any respect the old terms of a tenancy are by the instrument altered or modified, yet in the large majority of instances this class of documents contains nothing more than *admissions of liability* on the part of ryots to deal with landholders during *a specified period*, in respect of the lands held by the former, to conform in the dealings to the *terms and conditions settled by antecedent contract or established by long prevalent usage.* On the whole, therefore, the construction urged for the plaintiff is, in my opinion, the better if not the only correct construction. It remains to add a word with reference to the allegation that prior to the execution of the muchilika the defendant had made some payments on account of the instalments in question. If that allegation be found to be true that would of course *pro tanto*, be a defence on the merits. But such a circumstance could not in any way render the muchilika the less an acknowledgment for purposes of limitation.

Benson, J:—I agree with the conclusion arrived at by my learned colleague. In order to construe puttahs and muchilikas in a

Rajah of Venkatagiri v. Sheik Bade Saheb.

case like the present, we must bear in mind the circumstances under which such documents are executed.

Their purpose is to satisfy the requirements of the Rent Recovery Act (Madras Act; VIII of 1865). Section 4 of that Act evidently contemplates that they shall be exchanged at the beginning of each fasli or revenue year, but as a matter of convenience and of practice they are entered into at any time during the year, and usually only a short time before its close, by which time both parties know what land has been cultivated by the tenant and what rent is payable by him. The form and language of the documents are the same whether they are executed early or late in the year, and without regard to the fact that at the time of execution some or all of the instalments of rent may have already become due, and may even have been actually paid. The promise, therefore, in the muchilika to pay the rent due for the year by instalments on specified dates must be construed with reference to these admitted facts. If any instalment is already overdue, the promise must be construed as an acknowledgment that the instalment became payable on its due date, and as a promise to pay so much of it as has not, in fact, been already paid. This promise to pay must be understood as a promise to pay within a reasonable time, the amount then actually due and not already paid. It would be manifestly absurd to regard it as a promise to pay on a date already past and it would be unreasonable to regard it as a promise to pay over again a sum already paid. In regard to instalments not due prior to the exchange of puttah and muchilika, the promise must be regarded as an acknowledgment that the instalment will become payable on its due date; and as a promise to pay the same on such date. With regard then to instalments due before the date of the muchilika, the document, must, I think, be construed as if it ran, "I admit that the instalments herein mentioned fell due on the date herein stated, and I acknowledge my liability to pay such part of them as I have not already paid and I promise to pay the same within a reasonable time." Thus there was neither an acknowledgment of liability, nor a promise in regard to instalments already paid. If there was an arrear then due by the tenant, the muchilika was such an acknowledgment of liability in regard thereto as is contemplated by section 19 of the Indian Limitation Act. There is nothing opposed to this conclusion in the remarks of this Court in the case reported in *Peria Venkan Udaya Tevar* v.

Rajah of Venkatagiri. v. Shiek Bade Saheb.

Subramanian Chetti, I. L. R., 20 M., 239 to which the District Munsif has referred, for the tenant must be held to have made the acknowledgment with reference to his actual existing indebtedness, the fact of which was known to him at the time. The District Munsif must, therefore, ascertain, in the first instance, whether any, and if so what sum was due by the tenant when he signed the muchilika. The acknowledgment in the muchilika will save the time-bar in respect of any such sum. The practical result is that the muchilika is an acknowledgment of liability for the purpose of saving the bar by time, but it is not an acknowledgment of liability for the purpose of binding the tenant to pay the sum acknowledged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

The Secretary of State for India in Council ... { Appellant * 1st *Defendant.*

v.

Rajah Goundar ... ... { Respondent, *Plaintiff.*

The Secretary of State for India v. Rajah Goundar.

Sale for arrears of revenue—Revenue Recovery Act (II of 1864), S. 37.

The words "full amount of arrears" in S. 37 of the Revenue Recovery Act mean only the arrears of revenue on account of which the land was attached and the notice of sale issued, and do not include arrears which might accrue after the attachment and sale notice but before the sale.

The revenue due on the plaintiff's mitta for fasli 1302 fell in arrears and a portion of the mittah was attached and advertised for sale some days before the date fixed for the sale, the plaintiff tendered the amount of arrears for which the land had been attached. But at the time of the tender the rent for fasli 1303 had become due and had not been paid. The Collector, therefore, refused to stay the sale and sold the attached property for the arrears of fasli 1303.

Held :—That the sale was invalid and should be set aside.

Appeal from decree of the District Court of Salem in No. 18 of 1894.

The facts of the case appear sufficiently from the judgment of Court.

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* A. 126 1897. 6th September 1898.

The Secretary of Stat for India v. Rajah Goundar.

The Government Pleader for appellant.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The facts which it is necessary to notice in this case are as follow:—The revenue due on the plaintiff's mitta for fasli 1302 fell into arrear, and a portion of it was attached and advertised for sale, with the usual formalities. Some days before the date fixed for the sale the full amount (Rs. 2,766-4-0) of the arrear for fasli 1302, with interest and other charges was paid by the defaulter to the Tahsildar. Meantime, however, the revenue payable for fasli 1303 had become due, but had not been fully paid by the defaulter. The Collector, therefore, refused to stay the sale already advertised and sold the land in order to recover the arrears due for falsi 1303. The District Judge found that the sale was invalid and void, and against this decree the Secretary of State for India in Council appeals mainly, as we are informed by the learned Government Pleader, for the purpose of ascertaining the meaning of S. 37 of the Revenue Recovery Act (No II of 1864 Madras). The section runs as follows:—

"It shall be competent to the defaulter * * * to tender the full amount of the arrears of revenue with the interest thereon, and all charges which have been incurred in demanding the arrears or in attaching or managing the estate, or in taking the steps necessary for sale, and thereupon the sale shall be stayed."

The question for our decision is whether the words "the full amount of the arrears of revenue" mean the arrears of revenue on account of which the land was attached and the notice of sale issued, or include also arrears which accrued after the attachment and also notice, but prior to the day of tender; in other words, whether, in the present case, the Collector was bound to stay the sale on payment of the arrears of fasli 1302 specified in the attachment and sale notices, together with interest and other charges thereon, or was justified in bringing the land to sale for the arrears of fasli 1303, without making any demand or attachment or issuing any sale notice in respect thereof.

We have no doubt but that the sale of the land was, in the circumstances stated, invalid, and voidable at the option of the defaulter.

The Secretary of State for India v. Rajah Goundar.

There is nothing in S. 37 or in any other section of the Act or even in the notices issued under the Act to justify the conclusion that the land when attached and advertised for sale for a specified arrear, can after that arrear has been paid up, be legally sold for subsequent arrears. The Act gives the Collector power to recover arrears in various ways, one of which is by attachment and sale of so much of the land as may be necessary, but the exercise of this power must be in accordance with the provisions of the Act. First, he must issue a demand in writing under S. 25. If that is of no avail he may attach the land under S. 27, and may either keep it under management (S. 28), in order to recover the arrears out of the rents and profits, or may sell the land after due notice (S. 36). In all these sections the wording of the Act is such as to show that the procedure laid down refers to "the arrears" for which the demand was made, the amount of which is specified in the notices of demand, attachment and sale. Then "follows section 37 which gives the defaulter the right to pay up "the arrears" and charges at any time up to sunset of the day preceding the sale "and thereupon the sale shall be stayed." If it was intended that the sale should not be stayed unless all arrears subsequent, as well as as prior, to the attachment had been paid, we should certainly have expected an explicit statement to that effect, especially as the section states in detail the various sums which have to be paid in addition to "the arrears." The simple addition of some such words as "up to date of tender" after the words "arrears of revenue" would have made the intention, if such there was, quite plain. We do not think that there is anything to justify the importation of such words. It is argued for the appellant that it is reasonable that the terms should be made more stringent the longer the default continues; and though the defaulter might under S. 35 obtain the release of the land from attachment by paying merely the arrears for which the attachment was made, he ought to be required to pay subsequent arrears also if he fails to take advantage of S. 35 and allows the sale notice to issue. It is contended that the Legislature intended to indicate this further liability by the change in the language of S. 37, that in the sections prior to S. 37 and especially in S. 35 reference is made simply to "arrears" whereas in S. 37 the words are "the full amount of the arrears" and that this change of phrase is intended to include subsequent arrears. We do not think that this is so. The words "the full amount" appear

to be used merely to show clearly that a part payment would be of no avail. The words "the full amount" are used in S. 33 without any such special import being attached to them. If so considerable a further liability were to be imposed under S. 37, we think that it ought to have been, and would have been, clearly expressed.

Again, it is argued that the security of the revenue is endangered unless we accept the appellant's interpretation of section 37, inasmuch as section 42 provides that the land shall be sold free of incumbrances, and that after liquidating the arrears the balance shall be paid to the defaulter who may also (section 4) collect the rents due up to the day of sale.

In reply to this it would seem to be enough to say that possible risk to the revenue from defective legislation is no sufficient reason for putting a strained construction on the Act, but we may also add that the risk appears to be unreal, for S. 42 must be read with S. 2 which lays down the fundamental rule that the land is the security for the public revenue, and there seems to be little doubt but that, in accordance with the doctrine of conversion, the sale-proceeds of land sold at a sale properly held under the Act would be liable for any arrears of revenue due on the land at the date of sale. That, however, is not the question before us. The question is whether the sale was a valid sale notwithstanding that the arrears for which the land was attached had all been paid off prior to the sale. As already stated, we think it was not valid. We observe that in S. 13, cl. 5, of Regulation XXVII of 1802 (superseded and repealed by Act II of 1864) provision was made in perfectly explicit language for the recovery of arrears falling due while land was under management of the Collector, and in S. 43 of Act II of 1864 provision is made for the defaulter to recover rents due up to the date of sale of his land. The Legislature, therefore, when passing the Act had that date prominently in view for certain purposes, and it seems to us unlikely that if they intended that land attached for one arrear should be sold after its payment, for the satisfaction of other arrears falling due up to the date of the sale, they would not have expressed the intention in plain language.

We, therefore, confirm the decree of the Court below and dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice.

Venkata Chinnaya Rau ... Appellant* (*Counter-petitioner* in E. P. No. 1443 of 1896)

v.

Krishna Charyalu ... Respondent (*Petitioner*).

Venkata Chinnaya Rau v. Krishna Charyalu.

Suit for emoluments of office—Provincial Small Cause Courts Act, Sch. II, Art 13.—Suit of a Small Cause nature—Joint decree, execution of—"Final decree," meaning of—Limitation Act, Sch. ii, Art. 179,—Application for execution after decree of appellate Court—Appeal imperilling decree.

The plaintiff held the office of *stanacharya* in a certain temple under a contract by which the defendant dharmakarta had agreed that the plaintiff should hold the office and receive the mamool payments.

Held: that a suit by the plaintiff for the recovery of fees due for the office for a certain period as under this agreement is not a suit of a Small Cause nature but fell within Art. 13, Sch. II, Provincial Small Cause Courts' Act.

A sued two defendants a mother and her daughter for money due by virtue of an agreement executed by the mother alone and obtained a decree against both on the 6th May 1893. The mother died before an appeal was preferred. The daughter alone appealed and in second appeal the High Court reversed the decree in her favour on the 28th August 1895 on the ground that she was not a party to the agreement. On the 31st July 1897, A put in an application to execute the decree against the daughter as the representative of the mother.

Held: that the application was not barred by limitation; and that time should be reckoned from the date of the decree of the High Court, which was "the final decree of the appellate court" within the meaning of Art. 179.

Appeal from the order of the District Court of Godavari in A. S. No. 3 of 1897, affirming the order of the Court of the District Munsif of Ellore in M. P. No. 1932 of 1896 in E. P. No. 1443 of 1896 (O. S. No. 221 of 1892).

Plaintiff's father had certain law suits with the 1st defendants; with respect to the *dharmakartaship* of a certain temple and and, suits were withdrawn under a written agreement, dated the , the October 1862, by which the 1st defendant agreed that the pl of the father should retain his hereditary office of *stanacharya* in the temple and receive the mamool fees which was also mentioned in it. In 1892 the plaintiff brought O. S. No. 296 of 1892, in the

* C. M. S. A. No. 7 of 1898. 23rd August 1898.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, Mr. Justice Subrahmania Aiyar, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Boddam and Mr. Justice Moore.

Chakkara Chappan ... ... { Appellant* (*Respondent in* C. R. P. *No.* 371 *of* 1897).

v.

Moidin Kutti ... ... Respondent (*Appellant*).

Chakkara Chappan *v.* Moidin Kutti

Civil Procedure Code, Ss. 588,591,622.—Revisional jurisdiction forms part of the appellate jurisdiction—Letters Patent, cl. 15 and 36—The Charter Act, S. 13 (24 and 25 Vic. ch. 104).

Per *Shephard*, O. C. J., *Subrahmania Aiyar*, *Benson* and *Moore* J. J. The powers of revision exercised by the High Court under S. 622, Civil Procedure Code, forms part of its appellate jurisdiction within the meaning of S. 13 of the Charter Act and cl. 15 and 36 of the Letters Patent.

Per *Shephard*, O. C. J., *Subrahmania Aiyar*, *Boddam* and *Moore* J. J. An appeal lies against an order passed by a single Judge of the High Court under S. 622, Civil Procedure Code, when such order amounts to a judgment within the meaning of clause 15 of the Letters Patent.

Per *Davies*, J.—When a single Judge of the High Court passes an order admitting or rejecting an application for revision under S. 622 of the Code, no appeal lies against that order.

The power of revision exercised by the High Court does not form part of its appellate jurisdiction.

Under the rules framed by the High Court a single Judge can admit or reject an application for revision; but when such application has been admitted, it must be heard and determined by a Bench of two Judges (Rule 2, clause III). Where therefore, a single Judge hears and determines an application for revision on the merits, the order passed by him is passed without jurisdiction, and an appeal lies against that order; that being the only remedy for cancelling such order.

Per *Benson*, J.—No appeal under S. 15 of the Letters Patent lies against any order passed by a single Judge of the High Court under S. 622, Civil Procedure Code, the Letters Patent being controlled and limited by Ss. 588 and 591 Civil, Procedure Code.

Per *Boddam*, J. S. 15 of the Letters Patent is controlled by the Civil Procedure Code, but only in the case, where the order passed by a single Judge does not amount to a judgment whereby the rights of the parties are concluded and in this case there is no appeal; but where the order amounts to a judgment within the meaning of S. 15 of the Letters Patent (*DeSouza* v. *Coles* 3 M. H. C. R. 384) an appeal lies.

* L. P. A, No. 4 of 1898. 28th October 1898.

Chakkara Chappan v. Moidin Kutti.

Appeal under S. 15 of the Letters Patent against the order of Mr. Justice Boddam, C. R. P. No. 371 of 1897, presented against the order of the Court of the District Munsif of Quilandy in M. P. No. 156 of 1897.

This appeal coming on for hearing before Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Moore*, their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH.

This is an appeal from an order of a single Judge of this Court under S. 622, Code of Civil Procedure.

It is urged that there is no appeal and reference is made to the provisions of S. 591, Code of Civil Procedure.

In *Achaya* v. *Ratnavelu* I. L. R., 9 M. 253, it was held that S. 15 of the Letters Patent was controlled by S. 629 of the Code of Civil Procedure and that there was consequently no appeal from an order of a single Judge of this Court rejecting an application for review of judgment.

In *in re Rajagopal* I. L. R., 9 M. 447, it was laid down that, as S. 15 of the Letters Patent was controlled by S. 588 of the Code of Civil Procedure, no appeal lay from an order of a single Judge of this Court rejecting an application for leave to appeal *in formâ pauperis*.

In *Sankaran* v. *Raman Kutti* I. L. R., 20 M. 152, it was decided that no appeal lay from a decree passed by a single Judge of this Court in an appeal against an order of remand passed under clause 28 of S. 588 of the Code of Civil Procedure.

Again, in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* I. L. R., 20 M. 407, it was held that no appeal lay from an order of a single Judge of the Court dismissing an appeal against an order of remand passed under S. 562, Code of Civil Procedure (clause 28, S. 588, Code of Civil Procedure).

On the analogy of these rulings it would appear that we should decide in view of the provisions of S. 591 of the Code of Civil Procedure that no appeal lies from an order by a single Judge of the High Court passed under S. 622, Code of Civil Procedure.

Chakkara Chappan v. Moidin Kutti.

We may add that the question now under consideration does not appear to have been raised when the decision reported in *Vanangamudi* v. *Ramasami* I. L. R., 14 M. 406, was arrived at.

Our attention has, however, been drawn to the following observation of their Lordships of the Privy Council made in a judgment reported at *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry* I. L. R., 9 C. 406:—" It only remains to observe that their Lordships do not think that S. 588, Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the High Court to the Full Court." We are of opinion that it is advisable that the decisions of this Court which we have now quoted should be reconsidered with reference to this observation, and we would accordingly refer the following question to a Full Bench.

" Does an appeal lie from an order passed by a single Judge of the High Court under S. 622, Code of Civil Procedure ?"

K. Narayana Rao for appellant.

T. M. Appu Nedungadi for respondent.

OPINIONS:—

Mr. H. H. Shephard, Officiating Chief Justice:—The first question is whether any appeal lies under clause 15 of the Letters Patent from orders passed under the provisions of S. 622 of the Civil Procedure Code. Considering this question with exclusive reference to the language used by the framers of the Letters Patent and the Charter Act, I should have great difficulty in holding that clause 15, read as it must be with S. 13 of the statute, was intended to give a right of appeal in such matters. In order to hold that orders passed on revision come within the scope of clause 13 it must be held that they are made by the High Court in the exercise of its appellate jurisdiction. But for the opinion expressed in Allahabad shortly after the passing of the statute and practically acquiesced in by all the High Courts since that time, I should have thought that the power of superintendence conferred on the High Courts by S. 15 of the statute stood quite apart and distinct from their appellate jurisdiction. So that it could not possibly be said that in passing orders of a revisional character the

Chakkara Chappan v. Moidin Kutti.

High Court was exercising its appellate jurisdiction. I hesitate, however, to assert my opinion in contradiction to the opinion hitherto entertained and acted upon by this as well as by the other High Courts, especially when I find that cases have been brought before the Judicial Committee in which the present question might have been but was not raised.

Accordingly, I think it must be that the judgment of a single Judge acting under S. 622 of the Code is open to appeal, unless the right of appeal has been taken away by S. 588 of that Code. On that question I entirely agree with Mr. Justice *Subrahmania Aiyar*. The question is, in my opinion, concluded by authority which it is beyond our province to criticise.

The answer which I would give to the question is that, if the order appealed against amounts to a judgment, an appeal against it does lie.

Subrahmania Aiyar, J:—The first question for consideration is whether the power of revision exercised by this Court under S. 622 of the Code of Civil Procedure is, within the meaning of the High Courts Act and the Letters Patent constituting this Court, a part of the Court's appellate jurisdiction.

Now, according to Webster's Dictionary the first meaning in law of the noun appeal is "the removal of a cause or a suit from an inferior to a superior Judge or Court for re-examination or review." The explanation of the term in Wharton's Law Lexicon is only different in words. That explanation is "the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the inferior Court." And in consonance with this broad meaning of the word, *appellate* jurisdiction means "the power of a superior Court to review the decision of an inferior Court." (Ib). Here two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. This has been well put by Story. "The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter

has been already instituted and acted upon by some other Court, whose judgments or proceedings are to be revised" (section 1761, Commentaries on the Constitution of the United States). It was, however, argued that except where the superior Court is called upon to revise a decision of the inferior Court by a party entitled so to set it in motion, the exercise of the power of revision cannot be said to be an exercise of appellate jurisdiction. This argument clearly misses the true point which is intended to be conveyed and is conveyed by the term appellate jurisdiction. That point is the capital distinction between jurisdiction which is original and jurisdiction which is *not* original, *irrespective* of the circumstances and conditions in which the latter is to be exercised. Those circumstances and conditions are important, no doubt. But clearly they do not affect the abstract character of the jurisdiction but relate only to its application and practical working. An 'appellate jurisdiction,' as pointed out by Story in the passage immediately following that already quoted, "may be exercised in a variety of forms and indeed in any form which the Legislature may choose to prescribe." Such jurisdiction may be exercisable only in certain specified classes of cases. Its exercise may be claimable by party as a matter of right or only subject to his obtaining the leave of the Court which passed the decision to be appealed against. Again, the power to review or revise may be confined to points of law or may extend to matters of fact also. Clearly legislative provisions as to such matters only lay down some of the limitations under which the jurisdiction is allowed to be exercised. Nor are the conditions prescribed by S. 622 for the exercise of the power of revision conferred by it, different in essence from the kind of limitations just above referred to and more commonly imposed by legislatures on the exercise of appellate functions. But none of such limitations, however much they may circumscribe the exercise of the power, touches, as already remarked, the *intrinsic quality of the power itself*. Now as S. 622 in question gives in terms to this Court the power to revise decisions of Courts subordinate to it, it follows that the *essential criterion* of appellate jurisdiction, enunciated in the above quotation, is present in the case of proceedings held by this Court under that section and that the power exercised in such proceedings is, therefore, a part of the Court's appellate jurisdiction. It may not be out of place to add that to take the

Chakkara Chappan *v.* Moidin Kutti.

Chakkara Chappan v. Moidin Kutti.

word "appellate" in the sense explained above is not opposed even to ordinary usage. In support of this remark it is perhaps sufficient to refer to the fact that such writers as Sir Frederick Pollock and Professor Maitland speak in their 'History of English Law' not only of the "process in error," but also of the process known as "attaint," "certification," "prohibition," "removal of actions" and "false judgment" as "processes which have about them more or less of an appellate character" (pages 661-665). It is scarcely necessary to say that there is nothing in any portion of the High Courts Act or the Letters Patent inconsistent with the construction put as above on the term 'appellate jurisdiction.' On the contrary, there are clear indications in some of the provisions that that is the meaning intended. In clauses 19, 20 and 21 of the Letters Patent, while laying down what law is to be administered in civil cases by the High Court, its jurisdiction is for that purpose classified into Ordinary Original, Extraordinary Original and Appellate; from which it is clear that all the powers exercisable by the Court that are not included under Original, must come under Appellate jurisdiction—a classification which is adopted and recognised by the Judicial Committee in the case to be referred to hereafter relying on these very clauses.

It seems, therefore, to be clear that the term "appellate jurisdiction" is both grammatically and logically wide enough to comprehend the power exercisable under S. 622 referred to.

Turning now to the decisions on the point, *Queen* v. *Nyn Sing* (2 N. W. P. H. C. R., 117) is a direct authority in favor of the above construction; *Morgan*, C. J., *Ross*, *Turner* and *Spankie*, JJ., having therein unanimously held that the term "appellate" does include a High Court's judicial functions as a Court of revison. The only other decision bearing on the point, so far as I am aware, is that of the Judicial Committee in the Bombay case of *Navivaboo* v. *Turner* (L. R., 16 I. A. 156). There, Counsel contended that under the High Courts Act and Charter the division of jurisdiction is fourfold, Ordinary Original, Extraordinary Original, Appellate, and those special matters which are the subject of special and separate provisions. Their Lordships, however, held that the last mentioned specially provided matters did not form a distinct head of jurisdiction and the real division is threefold: Ordinary, Extraordinary, and Appellate. This

decision seems to go against the view that the power to revise exercisable under S. 622 is not a part of the appellate jurisdiction.

Chakkara Chappan v. Moidin Kutti.

The power so to revise may be taken to be, so far as it goes, analogous to the power of superintendence, exercisable by the Court under S. 15 of the statute and under which the Privy Council held in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (I. L. R., 9 C., 295), that a High Court is competent to revise certain decisions of the Courts subordinate to it. And the ruling of the Judicial Committee that the classification is threefold implies that the power of superintendence, though specially provided for, being obviously neither Original jurisdiction nor Extraordinary Original jurisdiction, within the meaning of the Statute and the Letters Patent as expounded by the Committee itself in the case cited, must come under the remaining head specified by their Lordships, *viz.*, Appellate jurisdiction. Consequently, the analogous power to revise, exercisable under S. 622, must likewise come under that head.

Before passing to the remaining question, I would briefly notice the suggestion that if the view taken above is correct, the powers of this Court exercisable as a Court of reference, under the chapter of the Civil Procedure Code, in which S. 622 is to be found, should also be held to come under appellate jurisdiction. This I admit, must be conceded. But that there is nothing anomalous in such a conclusion will be evident if the real character of the proceeding on a reference under the chapter is borne in mind. Such a reference is not merely *consultative* and is, therefore, unlike the case of *exparte County Council of Kent and Council of Dover* v. *exparte County Council of Kent and Council of Sandwich* (1891, 1 Q. B., 725); where the Court of Appeal held that upon the application made to the Court under the Statute there in question, the Court was not even bound to hear the parties concerned, if any; that there was no actual determination of an existing dispute in which a private right was involved; that the application was, consequently, purely consultative and, therefore, that form of procedure did not involve a right of appeal (see also *In re-Knight and Tabernacle Permanent Building Society* (1892, 2. Q. B., 615). But in the case of references under the Code of Civil Procedure this Court must hear the parties and is expressly empowered to

Chakkara Chappan v. Moidin Kutti.

alter, cancel, or set aside any decree or order which the Court making the reference has passed in the case out of which the reference arose and make such order as it thinks fit'; the lower Court being bound to give effect to the judgment or order so passed by this Court. *Overseers of the Poor of Walsall* v. *London and North-Western Railway Company* (L. R., 4 App. C., 30) is an authority (if authority were necessary with reference to such a plain point) for the view that the decision of this Court on a reference of the kind under consideration is judicial determination of the rights of the parties which, as Lord O'Hagan expressed it in the last mentioned case, is *mandatory*, or, as Lord Bowen put it *in re-Knight and the Tabernacle Building Society*, *effective*, and is, therefore, attended with the ordinary and usual incidents attaching to such determinations.

With reference to the remaining question in the case, I have but few observations to make. If I am right in the view that appellate jurisdiction includes revisional powers, it follows that against an order passed under S. 622 an appeal lies if it amounts to a judgment within the meaning of clause 15 of the Letters Patent cannot be questioned unless the said clause has, as contended before us, been modified by S. 588 of the Code of Civil Procedure. This contention is, however, opposed to the ruling of the Judicial Committee in *Hurrishchander Chowdhry* v. *Kali Sundari Debia* (L. R., 10 I. A. 4) in which their Lordships laid down that that section does not apply to a case such as the present where the appeal is from one of the Judges of the Court to the Full Court. I am unable to persuade myself, as I have already stated on a previous occasion, that the observations of the Committee on the point are mere *obiter dicta*. The contention that S. 588 modified clause 15 was not only distinctly raised but was also strongly pressed by Counsel in the argument (Ib. pp. 9 and 10). Their Lordships had, therefore, to give a decision upon the soundness or unsoundness of the contention. That, it appears to me, they did in unmistakable terms.

I, therefore, hold that an appeal does lie against an order passed by a single Judge of this Court under S. 622 of the Code of Civil Procedure when such an order is a judgment within the meaning of clause 15 of the Letters Patent.

Chakkara Chappan v. Moidin Kutti.

Davies, J. :—The question referred to us is "does an appeal lie from an order passed by a single Judge of the High Court under S. 622 of the Code of Civil Procedure". The said section 622 empowers the High Court to pass orders in cases in which no appeal lies when any Civil Court subordinate to it as (1) exercised a jurisdiction not vested in it by law, or (2) has failed to exercise a jurisdiction so vested, or (3) has acted in the exercise of its jurisdiction illegally or with material irregularity. The power exercised by the High Court is, therefore, one exercised in its revisional capacity. The chapter 46 of the Code, under which S. 622 appears indeed describes the power as one of revision. Now, under the rules of this Court of the 6th of November 1879, the only order which a single Judge of this Court can pass in relation to the revision of the proceedings of a Civil Court is to admit an application for such revision or to reject it *in limine* (vide Rule I cl. 4). When such application has been admitted by a single Judge it must be heard and determined by a Bench of two Judges under Rule II, cl. 3. In the present case the order of a single Judge was not one of admission or rejection but was passed on the merits after hearing the parties.

My answer to the reference, therefore, is that an appeal doth lie against the order passed in the present case but on the sole ground that it was passed without jurisdiction, a single Judge not being empowered to pass it and an appeal being the only remedy for cancelling the order which must have full force and effect and be binding on the lower Court so long as it remains uncancelled. But in cases where the order is one admitting or rejecting the application for revision which can be legally passed by a single Judge no appeal under clause 15 of the Letters Patent in my opinion lies. I consider that the right of appeal given by clause 15 of the Letters Patent from the judgment of one Judge of this Court extends only to cases falling within the original or appellate jurisdiction of the High Court, and that the phrase "appellate jurisdiction" does not include its revisional jurisdiction under S. 622 of the Code of Civil Procedure.

Section 622 of the Civil Procedure Code which may be compared with S. 35 of Act XXIII of 1861, under which a limited power of revision was given to the Sadr Court, may be said to be a

Chakkara Chappan v. Moidin Kutti.

development of the provision, contained in S. 15 of the Statute 24 and 25 Vict. c. 104. That section declares that each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and then goes on to give other powers, the power of calling for returns, directing transfer of cases, making rules of practice, and the like. In the original Letters Patent it is clear that orders passed by the High Court in the exercise of its powers of superintendence were not judgments in respect to which an appeal could be brought under clause 14 of those Letters Patent corresponding to clause 50 of the amended Letters Patent: because clause 14 of the Letters Patent of 1862 mentions only judgments in cases of original civil jurisdiction. Clause 15 of the amended Letters is, however, expressed in wider terms. An appeal is given from the judgment "of one Judge of the said High Court or one Judge of any Division Court pursuant to S. 13 of the said recited Act." This clause and S. 13 of the Statute must therefore be read together. S. 13 of the Statute provides for the exercise of the original or appellate jurisdiction vested in the High Court. Reading the section with the clause of the Letters Patent it could not have been intended to give an appeal in any matters other than those arising in the exercise of the original or appellate jurisdiction of the High Court. Clause 36 of the Letters Patent when considered with clause 15 and with section 13 of the Statute puts the matters in a still clearer light. Clause 36 is founded on S. 13 of the Act and like clause 15 refers to it expressly. S. 13 having provided for the exercise of the original and appellate jurisdiction by one or more Judges or by Division Courts, clause 36 declares that "any function which is hereby directed to be performed by the said High Court in the exercise of its original or appellate jurisdiction" may be performed by any Judge or by any Division Court constituted under the provision of the 13th section of the Act. It goes on to provide that in the event of a difference of opinion among the Judges of a Division Court the opinion of the majority or of the senior Judge shall prevail. This provision is supplemented by that contained in the latter part of clause 15 which in the case of an equal division of opinion in a Division Court gives the right of appeal to the High Court. It can hardly be doubted that the two clauses thus related to each other and both expressly referring to

section 13 of the statute refer to the same jurisdiction of the High Court and that, if the provision for a difference of opinion made in clause 36 refers only to matters arising under the original or appellate jurisdiction of the Court, the provision in clause 15 refers to no other matters. The language of clause 36 is clear. It refers to the functions hereby directed to be performed in the exercise of the original or appellate jurisdiction of the Court, and the language indicates that the appellate jurisdiction does not include revisional jurisdiction, for the mention of functions hereby directed to be performed in the exercise of original or appellate jurisdiction cannot include the function of superintendence, because that is not a function directed by the Letters Patent to be performed. The power of superintendence conferred by section 15 of the statute is not controlled by anything in the Letters Patent.

Futher, it does not seem possible to identify the appellate jurisdiction with the power of superintendence given under S. 622 of the Code. So far from it being correct to say that the two powers are indentical, it would be more correct to say that the one is exclusive of the other. The power of revision or superintendence is invoked when there is no right of appeal and its existence may be attributed to the absence of that right. There is no necessary connection between the one jurisdiction and the other. A jurisdiction similar to that which may be exercised under S. 15 of the Statute or under S. 622 of the Code was exercised by the Court of Queen's Bench over inferior Courts which were not subject to its appellate jurisdiction. The writ of *certiorari* serves the purpose for which the power of transferring suits or appeals is given by S. 15 of the statute, and there is the writ of *mandamus* the object of which is to compel the inferior Courts to exercise their jurisdiction and there is the writ of prohibition devised to restrain the inferior Courts from acting beyond the bounds of their jurisdiction. In view of the same objects, namely, that of compelling Courts to exercise their jurisdiction and that of keeping them within their jurisdiction a power of superintendence was given to the High Court by S, 15 of the Statute, and S. 622 of the Code, Civil Procedure refers solely to questions of jurisdiction. An appeal involves a re-hearing of the case—an entire re-hearing or a re-hearing limited to questions of law. It involves a possibility of a new decree or a judgment substituted in

Chakkara Chappan v. Moidin Kutti.

the place of that passed by the lower Court. The power of superintendence involves neither a re-hearing nor fresh decree. It extends only to ordering a thing to be done, or not to be done, or to be undone and done over again. It is in the interests of the public as much as in those of the individual that this power of control is given, and the Court may, therefore, act of its own motion under S. 622 which it cannot do in appellate matters. Again, the connection in which the power of superintendence is given under S. 15 of the Statute shows that it is something distinct from appellate jurisdiction. It appears as one of a group of powers conferred on the High Court. In the same sentence the section says the High Court shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal and shall have power to make rules of practice and to prescribe forms. If the term "appellate jurisdiction" be taken to denote the first-mentioned power, it would be difficult to say why it should not equally denote all the other powers mentioned in the section. Yet it could hardly be argued that the power of making rules is one of the functions for which provision is made in clause 36 of the Letters Patent. It seems to me, therefore, that it would involve a strain on the plain language of the Statute and of the Letters Patent to hold that an order passed in revision is a judgment passed in the exercise of the appellate jurisdiction of the Court. Such are my reasons for holding that when a single Judge of this Court has passed an order admitting or rejecting an application for revision made under S. 622 of the Code, which he may lawfully do under our rules, no appeal lies against that order.

Benson, J.:—The question referred for our decision involves two other questions, viz :—

(1) Whether the jurisdiction exercised by the High Court under S. 622, Civil Procedure Code, is included in the expression "appellate jurisdiction" as used in S. 13 of the High Court Act (24 and 25 Vict. c. 104) and in S. 36 of the Letters Patent of 1866, and

(2) Whether the right of appeal given by S. 15 of the Letters Patent against an order passed by a single Judge of the High Court is controlled and limited by Ss. 588 and 591, Civil Procedure Code.

Chakkara Chappan v. Moidin Kutti.

I am of opinion that both of these questions must be answered in the affirmative, the first for the reasons stated by my learned colleague Mr. Justice *Subrahmania Aiyar* in the judgment which he has just delivered, and the second for the reasons stated at length in the judgment which I recently delivered in the case of *Vasudeva Upadhyaya* v. *Visvaraja Thirthasami* (I. L. R., 20 M. 407).

As to the first question I think that in considering what was the intention of the Legislature, we may well look to the consequences that would follow from our adoption of any interpretation that is urged upon us for acceptance. Now if we accept the view that the term "appellate jurisdiction" refers only to appeals properly so called, but does not include the powers which the High Court possesses as a Court of reference and revision under chapter 46 of the Civil Procedure Code (which are essentially similar to the powers in regard to reference and revision possessed by the High Court under Act XXXII of 1861 before the High Court Act was passed) —if we accept this view, it follows that every reference to, and every act of revision by, the High Court must be dealt with by the whole Court consisting of the Chief Justice and five Judges. More than this, even the transfer of a suit or appeal under S. 15 of the High Court Act will require to be made by the whole Court. Again, S. 25 of the Provincial Small Cause Courts Act empowers the High Court to call for the records in order to satisfy itself that any decree or order of a Small Cause Court is according to law, and pass such order thereon as it thinks fit. Is it possible to suppose that the Legislature required that such comparatively small matters should be dealt with by the whole Court, while it allowed the largest interests civil and criminal, original and appellate, including even life and death to be dealt with by one or two Judges of the High Court under rules made by the High Court in that behalf? The jurisdiction of the High Court on a reference made under chapter 46 is essentially appellate in its character. The reference may be originated by either party moving through the lower Court, and the High Court is obliged to hear the parties in person or by pleader. Is it not a greater strain on language to hold that this function of the High Court is included in the general power of "superintendence" under S. 15 rather than in the term "appellate jurisdiction" in S. 13 of the High Court Act, and can it be supposed that the Legislature intended the whole Court to sit

Chakkarā Chappan v. Moidin Kutti.

and hear parties or their pleaders in each of these references? In applications for reference under S. 622 and under the Small Cause Courts Act and for transfer of suits it is also the practice, founded on obvious convenience, to hear the parties by their pleaders. The procedure is of an essentially appellate character as invoking the interference of a superior Court, and I am of opinion that all these acts were intended to be included in the term "appellate", as opposed to "original" jurisdiction in S. 13 of the High Court Act and in S. 36 of the Letters Patent founded thereon.

As to the second question, every argument urged before us in the present case has been fully dealt with in my judgment already referred to. The reasons I have there set forth would, I think, be regarded as absolutely conclusive but for an observation of their Lordships of the Privy Council in *Harish Chunder Chowdhry* v. *Kali Sundari Debia* (I. L. R., 9 C., 482). I have, however, given reasons for thinking that that observation was not intended to lay down a general interpretation of the law applicable to all cases in which an appeal is sought to be made to the Full Court under S. 15 of the Letters Patent against an order of a single Judge, but was made with reference to a particular case then before their Lordships. If I am right in this view it is open to us, notwithstanding that observation, to consider what the general law is. Reading Ss. 632 and 638 of the Civil Procedure Code with Ss. 588 and 591, it seems to me impossible not to hold that the Legislature intended thereby to restrict, and did, in fact, restrict in certain particulars the general right of appeal against the orders of a single Judge given by S. 15 of the Letters Patent.

I would, therefore, give an answer in the negative to the reference made to us.

Boddam, J.:—The question to be decided on this reference is "Does an appeal lie from an order passed by a single Judge of the High Court under S. 622, Code of Civil Procedure?"

S. 622 of the Civil Procedure Code is as follows:—

"The High Court may call for the record of any case in which no appeal lies to the High Court if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise jurisdiction so vested, or to have

acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order in the case as the High Court thinks fit."

The practice under this section has for many years been for one or other of the parties to the proceeding in the Court below who thinks that that Court has acted so as to come within this section to file a Civil Revision Petition before the High Court and this comes on before a single Judge who either acts or declines to act in the matter for the High Court and passes his order accordingly.

It is urged that under S. 15 of the amended Letters Patent whatever order the single Judge makes, whether he dismisses the petition or remits the case with an intimation that the Court below has acted wrongly—there is an appeal from that order to a Bench of the High Court and thence possibly to the Privy Council.

If this is so, it appears obvious that there is no case in which there is not an appeal (limited it may be in its extent but still an appeal) and that to the High Court, thence to a Bench of the High Court and thence possibly to the Privy Council. I feel satisfied that this is not the intention.

Here there is no question referred as to whether the particular order amounts to a judgment or not, because the reference is as to an "order" alone, nor do I imagine that it was the intention of the Court referring the question that the answer to the reference should amount to nothing more than that it depends upon what the order is (*e.g.*, whether it amounts to a judgment or not and is final or otherwise): for in that case the particular order should have been set out in the reference.

It must, therefore, in the first place, be assumed that the question is confined to an order in its limited sense. The argument was that as the Civil Procedure Code did not in so many words repeal any part of clause 15 of the Letters Patent, in every case where a single Judge sat his decision was appealable to a Bench of two Judges under that clause even when it resulted only in an order and no more as distinct from a judgment. This argument has been carefully and exhaustively refuted by Mr. Justice *Benson* in his judgment in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*, I. L. R. 20, M. 407. He says *inter alia*, and I adopt his words.

Chakkara Chappan v. Moidin Kutti.

"Section 44 of the Letters Patent expressly contemplates the Governor-General in Council passing laws which shall have the effect of amending or altering the provisions of the Letters Patent and declares that all the provisions of the Letters Patent are subject to such laws and may be in all respects amended and altered thereby. When the Governor-General in Council enacted the Procedure Code, he deliberately restricted the right of appeal in regard to certain specified orders and distinctly declared that those restrictions applied to the High Court, &c."

Chapter 43 of the Civil Procedure Code (Ss. 588 to 591 inclusive) deals with appeals from orders. S. 588 sets out the orders that are appealable. It says "an appeal shall lie from the following orders under this Code and from no other *such* orders." In the list of orders following, orders under S. 622 are not included; and S. 591 says "except as provided in this chapter no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction."

Assuming that when an order is passed under S. 622 it is passed by a Court in the exercise of its appellate jurisdiction, as was held to be the case in *Bhagirath* v. *Naubat Singh* I. L. R., 2 A. 117, by two of the Judges no appeal lies from an order under S. 622 unless the order is *ejusdem generis* with the orders specified in S. 588.

The words of S. 588 are "from no other *such* order," and I have no doubt that it is in reference to these words that their Lordships of the Privy Council in their judgment in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debia,* I. L. R., 9 C. 482, say "it only remains to observe that, their Lordships do not think that S. 588, Act X of 1877, which has the effect of restricting appeals applies to such a case as this where the appeal is from one of the Judges of the High Court to the Full Court." On this reference I conceive that it is no part of our duty to consider the particular order out of which the reference to the Full Bench is made, and without doing so it is, in my opinion, impossible to say whether the order in question is appealable or not.

The result of this judgment (so far as it applies to the question before us) appears to me to come to this, that if the order made by

a single Judge only amounts to an order such as is intended by chapter 43 of the Code, it is not appealable unless it is within S. 588, but if it amounts to more and is a judgment then it is appealable; in other words, that the right given by S. 15 of the Letters Patent to appeal from the order of a single Judge is only limited by the Code to such orders as do not amount to a judgment whereby the rights of the parties are concluded but, where this is the case, the order amounts to a judgment within the meaning of section 15 of the Letters Patent (3. M. H. C. R. 384), and an appeal lies.

Chakkara Chappan v. Moidin Kutti.

If the question before us were whether the particular order passed out of which this reference arose is appealable under S. 15 of the Letters Patent (and I was responsible for the order), I should have no hesitation in holding that the answer should be in the affirmative as it amounts to a judgment; but, as I have said before, that is not the question referred and, indeed, the Vakil supporting the affirmative proposition distinctly stated in answer to a question put to him from the Bench when the question was first argued that he contended all orders made under S. 622 were appealable so that if the High Court calls for the records of a case or declines to do so, in either case, according to this contention, the order is appealable. If this is the question we are required to answer in this reference, I should have no hesitation in answering the reference in the negative, for that would be to include as appealable orders within chapter 43 other than those mentioned in S. 588.

Another question has been raised, viz:—Whether an order passed under S. 622 is an order passed in the exercise of the appellate jurisdiction of the Court or merely under its power of superintendence as distinct from its appellate jurisdiction. Assuming, however, that orders under S. 622 were intended to be passed by the Court under its power of superintendence as distinct from its appellate jurisdiction, it is perfectly clear to my mind that in that case no order could be passed legally by a single Judge, for there is no power to delegate to a single Judge the right to pass orders for the Court under its power of superintendence as distinct from its appellate jurisdiction. Inasmuch, therefore, as this order was made by a single Judge and the reference refers only to orders

Chakkara Chappan v. Moidin Kutti.

so passed, it seems to me that such orders in all cases must be illegal and should be set aside even if there is no appeal under S. 15 of the Letters Patent. The fact that these applications are placed before a single Judge shows that whether rightly or wrongly it has hitherto been assumed that they come within the appellate jurisdiction of the Court and have been so treated for sometime. I do not think, therefore, that we should be serving any useful purpose in determining that which would stultify all previous orders so passed and I have, therefore, refrained from giving any opinion upon the question.

On the whole, I am of opinion that it is not possible to answer this reference either in the affirmative or in the negative. I can only say that in some cases there may, in my opinion, be an appeal and in others there is no appeal. It depends upon the order in question.

Moore. *J*, :—At the hearing of an appeal preferred from an order of a single Judge of this Court under S. 622, C. P. C., it was urged that under the provisions of S. 591, C. P. C., there was no appeal, and the following question has accordingly been referred to the decision of a Full Bench, "Does an appeal lie from an order passed by a single Judge of the High Court under S. 622 C. P. C.?"

It is admitted that if an order passed under S. 622, Civil Procedure Code, is not a judgment within the meaning of S. 15 of the Letters Patent, there can be no appeal from it under the provisions of the Letters. As to what is a judgment under this section, reference may be made to the decision of Mr. Justice *Bittlestone* reported at 3. M. H. C. R.—384, where he observed. "The word judgment there (*i.e.* S. 15 of the Letters) used cannot be limited to a final judgment in a suit, nor indeed to a judgment in a suit at all, but must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant." (Reference may also be made to the decision of *Markby*, J., on the point in *Justices of the Peace for Calcutta* v. *The Oriental Gas Company* 8 B. L. R, 433, followed in *In the matter of the petition of Kally Soondery Dabia* I. L. R., 6, C. 594 at p. 601). The question, therefore, to be

considered is, whether an order amounting to a judgment having been passed under S. 622, an appeal from it lies, no express appeal being provided for from such an order in the Civil Procedure Code in view of the provisions of S. 591, Civil Procedure Code, which lays down that no appeal is to lie from any order passed by any Court in the exercise of its original or appellate jurisdiction except as provided for in chapter 43 of the Civil Procedure Code?

Chakkara Chappan v. Moidin Kutti.

It must be admitted that this Court has not adopted a uniform course in dealing with the question as to whether appeals of the class now under consideration lie or not.

In certain reported decisions referred to by my learned colleague and myself in our order of reference to the Full Bench the question as to how far Ss. 588 and 629 of the C. P. C., control the provisions of S. 15 of the Letters Patent has been considered, the view taken being that where those sections expressly direct that orders passed under them are final there can be no appeal under the Letters Pattent. In *Vanangamudi* v. *Ramasami* I. L. R., 14 M. 406, where an appeal under the Letters Patent from an order passed under S. 622 of the C. P. C. was considered, the only question adjudicated on in considering as to whether an appeal lay or not was as to whether the order was a judgment. The point now at issue was not raised. In a number of decisions reported in the 16th and 19th volumes of the I. L. R., Madras, appeals preferred under S. 15 of the Letters Patent Act from orders under 622 of the Civil Procedure Code were heard and disposed of, but in all these cases as far as can be seen from the reports the question as to whether such appeals lay was not discussed. In *Venkata Reddi* v. *Taylor* I. L. R., 17 M. 100, the question as to whether, when a single Judge of this Court acting under S. 25 of the Provincial Small Cause Courts Act (IX of 1887) revises a decree of a Small Cause Court, his order could be appealed against under S. 15 of the Letters Patent was considered and it was decided that notwithstanding S. 27 of that Act such an appeal lay. It appears to me that it would be difficult to differentiate this case from the one now under consideration. If, in spite of S. 27 of the Small Cause Courts Act, an appeal can be preferred from an order passed under S. 25 of that Act it seems to me to follow logically that notwithstanding S. 591 of the Civil Procedure Code an appeal lies

Chakkara Chappan *v.* Moidin Kutti.

from an order passed by a single Judge under S. 622, Civil Procedure Code, I cannot find any definite rulings on this question in the reported decisions of the Calcutta and Bombay High Courts. The very important decision of their Lordships of the Privy Council referred to in the order of reference (I. L. R., 9 C. 482) remains for consideration. The ruling of their Lordships to be found there as to the effect of S. 588, Civil Procedure Code, is as follows:—"It only remains to observe that their Lordships do not think that S. 588, Act IX of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the High Court to the Full Bench." The ruling has been recently considered at length in a judgment by *Subrahmania Aiyar* and *Benson*, JJ., reported at I. L. R., 20 M. 407. It has there been held by Mr. Justice *Benson* (pp. 411 and 412) that the words used by their Lordships, as quoted in the present order of reference, do not lay down as a general rule that S. 588 of the of the Civil Procedure Code does not apply to any case in which an appeal is sought to be made under S. 15 of the Letters Patent from the order of a single Judge. It is pointed out that in the case there under consideration a Judge of the High Court of Calcutta had by an order passed under S. 610, Civil Procedure Code, refused to transmit to the Court of First Instance for execution a decree of the Privy Council and Mr. Justice *Benson* was of opinion (following no doubt the view expressed by *Edge,* C. J., in *Banno Bibi* v. *Mehdi Husain* I. L. R., 11 A. 375 and *Muhammad Naim-ul-lah Khan* v. *Ishan-ul-lah Khan A.* 14 A. 226) that although the order made by the Judge was under S. 610, C. P. C., yet it was none the less an oder determining a question arising between parties to the suit in which the decree was passed and relating to the execution thereof (S. 244, Civil Procedure Code). "It was therefore," Mr. Justice *Benson* goes on to observe, "an order of the kind expressly declared by S. 2 of the Code to fall within the definition of "a decree" and, as such, it was obviously an order against which an appeal would lie as against a decree." According to Mr. Justice *Benson* the language used by their Lordships amounted to nothing more than this. "S. 588, no doubt, has the effect of restricting appeals in the case of orders which are not decrees, but it does not apply to such a case as this before us which is an order in execution and, therefore,

Chakkara Chappan v. Moidin Kutti.

a decree. When therefore such an order has been made by a single Judge an appeal lies to the Full Court." With all due deference to my learned colleague, I cannot accept the interpretation here put on the clear and unambiguous language of their Lordships. There is nothing to show that they looked upon the order of Mr. Justice *Pontifex* then under consideration (*vide* I. L. R., 6 C. 594), as a decree under S. 244, C. P. C., or that the provisions of that section were in their minds when they made the observation under consideration. If the report is referred to, it will be found (pp. 486 and 487 that Counsel for the respondent strongly urged on the consideration) of their Lordships that whatever might have been the case before the enactment of S. 588 of Act X of 1877, the provisions of that section rendered it clear that there was no appeal. Their Lordships, it is shown, duly considered this argument and overruled it in the observation now under consideration and this being the view that they have taken of S. 588 of the C. P. C., it can scarcely, I think, be doubted that they would take a similar view of the argument that S. 591 takes away an appeal given by S. 15 of the Letters Patent if the question came before them for decision. It appears to me to be very difficult to understand why, if the Legislature intended by Ss. 588, 591 and 629 to take away the right of appeal, from decisions of single Judges of the High Court granted by S. 15 of the Letters Patent, this very important change in the law was not made by clear and distinct enactment. It must, I think, in considering this question, be borne in mind that no attempt is made in Act XIV of 1882 to provide a complete Code of Procedure for the High Courts in all branches of their civil judicial work. Nothing is said, for example, as to whether appeals are to be heard by one Judge or by a Bench of two or more Judges. The power given to the Chief Justice to make rules as to such matters under Ss. 13 and 14 of 24 and 25 Vic. ch. 104 is not interfered with. If it was intended that the right of appeal given by S. 15 of the Letters Patent from all judgments of a single Judge should be taken away, it is only reasonable to presume that the Code would have gone further and provided as to what judicial acts may be done by a single Judge and what matters should go before a Bench of at least two Judges.

It is further urged that Ss. 632 and 638, C. P. C., show that Ss. 588 and 591 apply to the High Court and that it was

Chakkara Chappan v. Moidin Kutti.

intended that the right of appeal given by S. 15 of the Letters Patent should not be affected by the provisions of Ss. 588 and 591, it may be presumed that these two sections would have been included in those mentioned in S. 638 as sections which do not apply to the High Court. It is clear, however, that this could not have been done, for the provisions of sections 588 clause 1, provides that if a District Munsif passes an order under S. 20 of the Code, an appeal lies to the District Judge, but that there is no second appeal to the High Court, while if a District Judge passes such an order an appeal can be preferred to the High Court. Whatever view be taken of section 15 of the Letters Patent it would have been impossible to include section 588 among those sections that do not apply to the High Court.

It has further been urged that when a Judge of the High Court acting under S. 622 of the Code of Civil Procedure passes a judgment in revision, he has not done so in the exercise of either the original or appellate jurisdiction vested in the High Court (24 and 25 Vic. c. 104, S. 13) and that there is, consequently, no appeal from his judgment under S. 15 of the Letters Patent. It does not appear to me that this is a valid contention. Under S. 8 of 24 and 25 Vict. c. 104 it was directed that the Supreme Court and the Court of Sadr Adalat and Fouzdary Adalat in Madras should be abolished and that (S. 9) a High Court should be established which should have and exercise all jurisdiction and every power and authority whatsoever vested in any of the Courts thus abolished *at the time of their abolition.* The extensive powers of revision now exercised under S. 622 of the Civil Procedure Code were first given to the Sadr Court in a very restricted form by S. 35 Act XXIII of 1861 which received the assent of the Governor-General on the 28th August 1861. The Sadr Court was not abolished and the High Court, which was to take its place, established till the first Letters Patent were issued in 1862. When, therefore, the High Court was established, among the powers vested in it were those of revision given to the Sadr Court under section 35 of the Act of 1861 which is the basis of S. 622 of the present Code. The question, therefore, that arises for consideration is as to whether these powers of revision are included in the matters dealt with in S. 13 of 24 and 25 Vict. c. 104 or with those treated of in S. 15. Such

Chakkara Chappan v. Moidin Kutti.

powers are, I am of opinion, certainly not dealt with in S. 15 which treats of acts of superintendence over Subordinate Courts, such as, calling for returns, transfer of appeals and suits from one Court to another and the power to issue rules relating to practice and procedure and to prescribe forms and clearly gives no power such as that exercised under S. 622 of setting aside a judgment of a Subordinate Court and passing a revised judgment in lieu thereof. Reference may be made to I. L. R., 1 A. 101, where it is held that S. 15 of the Charter Act confers on a High Court administrative authority and not judicial powers and where it is pointed out in a foot-note that this is the view that has been followed by the Calcutta High Court in a long series of cases. The powers of revisions now under consideration must, therefore, come under S. 13 and as such powers are certainly not exercised by the High Court in its original jurisdiction, it follows, in my opinion, that they come under the appellate jurisdiction of that Court. If this view be correct a judgment under S. 622, C. P. C., is passed pursuant to S. 13 of 24 and 25 Vict. c. 104 and an appeal accordigly lies from it under S. 15 of the Letters Patent.

For the foregoing reasons, I am of opinion that it was not the intention of the Legislature that the provision of S. 15 of the Letters Patent should be affected by S. 591 of the C. P. C., that, consequently, an appeal lies from any order amounting to a judgment passed by a single Judge under S. 622 of the C. P. C., notwithstanding the provisions of S. 591, and I would accordingly answer the question referred as follows:—An appeal lies from all orders amounting to judgments passed by a single Judge of the High Court under S. 622 of the Civil Procedure Code.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Moore.

Nagoji Ramachandra and others ... (*Petitioners—accused.*)*

v.

Queen Empress ... ... *Counter—petitioner.*

Nagoji Ramachandra v. Queen Empress.

Criminal Procedure Code, S. 146—the Indian Penal Code Ss. 188, 447.—Tresspass upon property under attachment of Magistrate—Criminal trespass.

* Criminal Rev. Case No. 226 of 98, 16th September 1898.

Nagoji Ramachandra v. Queen Empress.

Disobedience to an order passed by a Magistrate under S. 146 of the Criminal Procedure Code is not an offence falling under S. 188 of the Indian Penal Code and is not punishable as such.

A person who trespasses upon and cultivates immoveable property which has been attached by a Magistrate under S. 146 of the Criminal Procedure Code commits the offence of criminal trespass, and he is liable to be punished under S. 447, of the Indian Penal Code.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying to revise the judgment of the Sub-Divisional 1st Class Magistrate in Appeal No. 8 of 1898, presented against the judgment of the 2nd Class Magistrate of Tiruvadi, in Calendar Case No. 651 of 1897.

Sivaji and Nagoji were two brothers constituting an undivided family. Disputes arose between them in the division of their family property in 1890. Sivaji leased out his lands to certain lessees for seven years and Nagoji leased out same lands to another set of lessees for five years. As there was a likelihood of a breach of the peace in consequence of disputes between the brothers and their lessees, the Magistrate of the place issued a notice under S. 145 Criminal Procedure Code and, after enquiry, finding that neither of the lessees was in possession, attached the property in dispute under S. 146, and referred the lessees to a Civil Court to have their titles decided. Sivaji's lessees accordingly instituted a suit in 1892 against the lessees of Nagoji. But the Civil Court finally held that neither of the lessees had any title or right to possession. The property all along continued to be under attachment and was annually leased out by Government. In August, 1896, the District Magistrate issued an order to leave the lands fallow and had this order communicated to the lessees of the two brothers. He also gave notice by beat of *tom-tom* that none should enter the land. By this time the lease of the younger brother had expired and the lessee of the elder brother had died. Consequently, in September 1896, the younger brother Nagoji petitioned the District Magistrate requesting the delivery of the attached land. But as he received no reply till July 1897, he leased the land to the 2nd accused, one of his former lessees, and the 3rd accused. Then the 2nd and 3rd accused accordingly entered upon the land and cultivated it. For these acts of theirs, the three accused were prosecuted and convicted by the 2nd Class Magistrate of Tiruvadi,

Nagoji Ramachandra v. Queen Empress.

and on appeal, by the Sub-Divisional Magistrate, the 1st accused under Ss. 109, 188, 447, the 2nd accused under Ss. 188 and 447 and the 3rd under Ss. 109 and 188. The accused thereupon preferred this criminal revision petition to the High Court.

R. Kupuswami Aiyar for accused.

The Government Pleader for the Crown.

R. *Kuppusawmi Aiyar* :—Disobedience to an order passed under S. 146, Criminal Procedure Code, is not an offence punishable under S. 188, Indian Penal Code. The order issued under that section is not one directed to the parties to the proceedings, but one directed to a Police officer to take possession of the land in dispute, *vide* Form 33, Sch. V, Criminal Procedure Code. The 1st and 3rd accused were not parties to the possession-case and any order passed therein could not possibly affect them. At the time of the alleged trespass, the order of the Magistrate should be held not to have been subsisting, because the circumstances which form the pre-requisite for the order ceased to exist at the time of the expiry of one of the leases and the death of the other lessee without taking any possession for over six years.

The order was not subsisting at the date of the alleged trespass for another reason. The order was to stand till the Civil Courts decided the title of the lessees; and with the decision of the Civil Court that neither of the lessees had any right to the property, the order came to an end. The acts of the accused do not amount to criminal trespass, for their entering on their own lands does not amount to any offence, neither did they enter with the intent to intimidate, insult or annoy any person in possession of the property. *Vide Joykissen Mookerjee* v. *Peary Mohun Mookerjee* 24 W. R., 40. Further, the order of the Collector that the land will be left fallow is tantamount to giving up possession. The acts of the accused do not therefore constitute an offence either under S. 188 or 447, Indian Penal Code.

The Government Pleader. In 1896, when the Collector directed the land to be left fallow, he also gave notice by beat of *tom-tom* on the lands that none should enter there. The accused by violating that order have brought themselves within the terms of S. 188, Indian Penal Code. Further, they are clearly guilty of criminal trespass.

The Court delivered the following

ORDER :—We do not consider that the conviction under S. 188, Indian Penal Code can be upheld. The order passed

Nagoji Ramachandra v. Queen Empress.

by the Magistrate under S. 146 of the Criminal Procedure Code was an order to a Police-officer to take possession of the land and not an order to any one of the accused persons. It is urged that the order of the 29th July 1896 is one the disobedience of which would constitute an offence under S. 188, Indian Penal Code, but we cannot accept that view. This is merely an administrative order by the Deputy Collector to the Tahsildar to the effect that the lands are not to be leased out for the future. We set aside the conviction of the 3rd accused under S. 188, Indian Penal Code. It is, however, shown that the 1st and 2nd accused deliberately entered on the land while it was still under attachment by order of the Magistrate. In doing so they, we consider, committed an offence under S. 447, and we uphold the findings and sentences of the Magistrate under this section. The 3rd accused, it is admitted, did not enter on the land and he has been convicted under S. 188, Indian Penal Code, only. It is ordered that the fine imposed on him be refunded if it has been paid.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar, and Mr. Justice Benson.

Obai Goundan ... ... Appellant* (*Defendant*)

v.

Ramalinga Aiyar ... ... Respondent (*Plaintiff*).

Obai Goundan v. Ramalinga Aiyar.

Rent Recovery Act (Madras Act VIII of 1865), S. 11—Registration Act, S. 17.

A document which only evidences an agreement to vary the terms of a tenancy with reference to the amount of rent to be paid does not require registration.

In a suit by a landlord against his tenant for acceptance of patta, the tenant claimed a permanent remission of rent under a *takid* issued by the predecessor in title of the plaintiff, the alleged ground for the remission being that the waste lands in the defendant's patta contained inferior soil and were partly within the water spread of a tank and that the defendant used to get occasional remissions whenever any lands were left uncultivated.

Held: that the *takid* did not require registration and was admissible in evidence to prove the reduction in the amount of rent to be paid; but that the

* S. A. No. 1284 of 1897. 2nd September 1898.

stipulation for the remission of rent to be paid was not binding on the plaintiff as it had not been granted for any of the purposes mentioned in the last para. of S. 11, Rent Recovery Act.

Obai Goundan v. Ramalinga Aiyar.

Second appeal from the decree of the District Court of Salem in A. S. No. 19 of 1896, reversing the decision of the Court of the Sub-Collector of Salem in summary suit No. 18 of 1895.

This was a suit by the Manager of the Berikai estate under the Court of Wards against one of the tenants of the estate for enforcement of acceptance of a patta and execution of a muchilika. The plaintiff claimed a rent of Rs. 162-8-11. The defendant, on the other hand, claimed a permanent remission of Rs. 45-11-3 under a *takid* given to him by the late owner of the estate on the 26th of May 1888.

"You having asked me to grant you a cowle remission of half assessment on the ground that out of the wet lands under the tank held on patta formerly by your father and now by you—those near the tank contain much "chowdu" soil while those far from the tank are sandy and some of them within the waterspread, with the result that there is loss of crops, the said lands have been inspected with the result that the above defects have been found to really exist. It also appears that the custom has been for you to pay assessment in the year in which crops are raised and to obtain remission in years in which the lands were left waste. Considering all these facts, a permanent cowle remission of half the above assessment is granted from fasli 1297 and you shall pay the balance every year whether the lands are cultivated or left waste."

It was not alleged or proved in the Courts below that the remission referred to in the *takid* had been obtained from the defendant as a matter of right. The Sub-Collector allowed the defendant's contention and ordered the patta to be issued for the reduced amount. On appeal, the District Judge held that the *takid* was inadmissible in evidence for want of registration as a grant, and that as a contract it was bad for want of consideration, as the owner of the Estate was not legally bound to grant the remissions referred to in the *takid*. He, therefore, reversed the decree of the Sub-Collector and ordered a patta to be issued for the larger amonnt. The defendant then preferred this second appeal to the High Court.

V. Bhashyam Aiyangar and *C. R. Tiruvenkatachariar* for appellant.

S. R. Ramasubba Aiyar for respondent.

Obai Goundan v. Ramalinga Aiyar.

The Court delivered the following

JUDGMENT:—We think the judge was in error in holding that Exhibit II required to be registered. The document only evidences an agreement to vary the terms of tenancy with reference to the amount of rent to be paid. As such it cannot be held to relate to an interest in immovable property and, therefore, did not require registration, *Satyesh Chunder Sircar* v. *Dhunpul Singh* I. L. R., 24 C., 20.

It was next contended that this document Exhibit II should be held to be binding on the plaintiff inasmuch as rent which up to then was payable only in respect of such lands as were cultivated thereby was made payable in respect of the entire holding whether cultivated or not. If up to the date of this document the defendant was not bound to pay for other than cultivated lands, the agreement on the part of the defendant to pay for lands whether cultivated or not would have made the agreement binding not only on the late Zemindar, but also upon the plaintiff, his successor, and no question would have arisen under the proviso to S. 11, Rent Recovery Act; but in the lower Courts the defendant did not allege that prior to this document he was entitled to remission as a matter of right. We cannot, therefore, say that the Judge was wrong in holding that the remissions prior to it were mere concessions. Exhibit VII to which our attention has been drawn is not consistent with the contention that the remissions were a matter of right, nor does the language of Exhibit II itself support that view. That Exhibit II does not grant reduction of rent otherwise properly payable in respect of the land is quite clear, and unless such reduction is granted for any of the purposes set out in the proviso to S 11, already referred to, the arrangement must be held not to be binding upon the plaintiff. The finding of the Judge is that the reduction was not agreed to for any such purposes. The mere fact that the defendant has made some improvement since the execution of Exhibit II cannot bring the case within the exception to this proviso.

For these reasons, we must hold that the decree of the lower appellate Court is right, and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Benson.

Queen Empress ... ... Appellant* (*Plaintiff*)

v.

Makam Abayya and others ... ... Accused (*Defendants*).

Queen Empress *v.* Makam Abayya.

Indian Penal Code, S. 206, 378, 403, 424,—'Standing crops' attachment by a Civil Court on—Removal of standing crops not amounting to theft.

Standing crops in the possession of the accused had been attached by a Civil Court in a suit in which they were defendants. The accused notwithstanding the attachment cut and carried away the crops.

Held:—that the act of the accused amounted to an offence under S. 424, Indian Penal Code.

Per *Benson, J.*:—The act of the accused amounts also to the offence of criminal misappropriation under S. 403, Indian Penal Code.

Appeal from the judgment of the Sub-Divisional Magistrate of Cuddappah in Appeal No. 10 of 1898 reversing the judgment of the 2nd Class Magistrate of Kamalpuram in Calendar Case No. 21 of 1898.

On or about the 31st December 1897, the accused cut and carried away, cholam, green and black gram crops of theirs which had been attached on the 19th December 1897, by order of the District Munsif's Court, Cuddapah, in O. S. No. 614 of 1897, the accused being defendants in that suit. The accused were charged and convicted under S. 379, Indian Penal Code, by the 2nd Class Magistrate of Kamalpuram. On appeal, the Sub-Divisional Magistrate held that the offence commited by the accused was under S. 206, Indian Penal Code, and that the 2nd Class Magistrate had no jurisdiction to try the case without sanction to do so by the District Munsif of Cuddapah, under S. 195, Criminal Procedure Code. He accordingly acquitted the accused. The Government then prefered this appeal to the High Court.

The Public Prosecutor (E. B. Powell) for the Crown.

V. V. Srinivasa Aiyangar for accused.

The Court delivered the following

JUDGMENTS:—*Benson, J.*:—The Deputy Magistrate was, in my opinion, right in holding that the alleged act of the accused in

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* Cr. appeal 370 1898. 13th September 1898.

Queen Empress v. Makam Abayya.

cutting and removing the standing crops which had been attached by the Civil Court did not amount to theft. In order to constitute theft there must be moving of moveable property with the intention of taking it dishonestly out of the possession of another person. Standing crops are, for the purposes of the Indian Penal Code, immoveable property, and when such crops are attached under S. 274 of the Civil Procedure Code, possession of them is not transferred to the Court. Possession remains with the owner, but he is forbidden to alienate and charge the crops.

When the crops are cut they become moveable property, but it would, I think, be difficult to conclude that possession of them is transferred to the Court or its officer by the act of cutting. The cutting, however, cannot put an end to the attachment once properly effected. The crops must be regarded as moveable property under attachment, but in the possession, as before, of the judgment-debtor. I am not unmindful of the views of this Court in Criminal Revision Cases Nos. 459 of 1883 and 121 of 1887. (Wier's "Law of Offences," pp. 245), 245, in the former of which it was assumed, and in the latter of which it was held, that theft could be committed by the owner of a crop under attachment removing it. In both of these cases, however, the attachment was by distraint made by a Revenue Court and the mode and effect of attachment by a Civil Court as regards possession was not considered. No doubt, when in the present case the crops was cut, the Court or its officer had the right to at once take possession of it, but the right to possession is not the same thing as actual possession. The actual possession remained with the judgment-debtor, and when he removed the crops he did not take it out of the possession of the Court or its officer or any other person. The offence committed was, therefore, not theft, but it was criminal misappropriation within the meaning of S. 403, Indian Penal Code, inasmuch as the judgment-debtor thereby dishonestly converted the property to his own use. The act was also an offence punishable under S. 424, Indian Penal Code, *viz.*, dishonest removal of property, even when such property belongs to the person removing it; and the accused might properly have been convicted of the offences by the Sub-Magistrate, or, by the Deputy Magistrate when this case came before him in appeal.

I would, therefore, set aside the order of acquittal made by the Deputy Magistrate and direct the Deputy Magistrate to restore the appeal to his file and dispose of it on the merits and with reference to the above observations.

Queen Empress v. Makam Abayya.

Davies, J.—I agree to the order proposed on the ground that the case was not one of theft, but fell under S. 424, of the Penal Code.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Rajagopala Pillai ... ... Appellant* *(Plaintiff)*

v.

Krishnasami Chetti ... ... Respondent *(2nd Defendant)*.

Rajagopala Pillai v. Krishnasami Chetti.

Dissolved partnership—Power of partners to bind each other—Power of surviving partners to bind representatives of deceased partner by acknowledgment of partnership debts—Limitation Act, S. 21.

Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorized to do so.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 289 of 1895, presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 407 of 1894.

The plaintiff sued on an account stated between him and the 1st defendant. The settlement of the accounts was on 14-11-91. The plaintiffs ought to make the 2nd defendant liable on the ground that the 2nd defendant's father was a partner with him in the dealings out of which the plaintiff's debt arose. The 2nd defendant's father had died in August 1891, previous to the settlement of accounts. The suit when it was brought was barred if based upon the items of the accounts, but was in time from the date of the settlement. The District Munsif decreed for the plaintiff not only against the 1st defendant but also against the 2nd defendant on the ground that he had become a member of the firm subsequent to his father's death, and was, therefore, bound by the settlement made by the plaintiff with the 1st defendant.

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* S. A. No. 1290 of 1897. 6th September 1898.

Rajagopala Pillai v. Krishnasami Chetti.

On appeal, the District Judge held that the 2nd defendant never became a partner subsequent to his father's death and that, as his father died previous to the settlement, the 2nd defendant was not bound by the settlement. He, therefore, held that the suit was barred by limitation and reversed the decree so far as as the 2nd defendant was concerned. The plaintiff then preferred this second appeal.

T. Rangachariar for appellant

V. Krishnaswami Aiyar for respondent

The Court delivered the following

JUDGMENT:—The District Judge's finding is sufficiently clear. The only question raised was whether or not there was a partnership at the time of the acknowledgment. This the Judge negatives.

A surviving partner cannot bind the representatives of a deceased partner unless he is authorised to do so. It is not suggested in this case that the surviving partner was so authorized except in so far as that is implied by the continuance of the partnership and this is negatived by the Judge.

We are unable to see that the law is in any way affected by the sections of the Contract Act referred to. The fact that the partnership is being wound-up is not of itself sufficient to authorise a surviving partner to bind the representatives of a deceased partner by acknowledging a debt.

The second appeal is dismissed with costs

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice and Mr. Justice Moore.

Ramachandra Rao and others ... ... Appellants * (*Plaintiff*)

v.

Kuppusami Aiyar ... ... Respondent.

Ramachandra Rao v. Kuppusami Aiyar.

Promissory note—Negotiation of—Transfer of pro-note without endorsement.

A promissory note may be affirmed by the holder just like any other chose in action without endorsement; there is nothing in the Negotiable Instruments Act

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* A. No. 199 of 1897. 27th September 1898.

[This case follows A. No. 175 of 1897].

Ramachandra Rao v. Kuppusami Aiyar.

which prescribes endorsement as the only mode of transfer so as to render transfer made by any other mode invalid.

Pattat Ambadi Marar v. *Krishnan* I. L. R., 11 M., 290 distinguished.

A transfer of a pro-note without endorsement does not give the transferee the rights which, according to Law Merchant (The Negotiable Instruments Act) an endorsement would give him.

The Swadesa Dravya Sekhara Nedhi Company of Coimbatore went into voluntary liquidation and appoined certain liquidators to wind-up the affairs of the Company. The plaintiff bought the assets of the Company under a deed of assignment by the liquidators, but failed to get endorsed by them certain promissory notes which formed part of the assets. The present suit, one of a series, was brought on those pro-notes. The defendant, the executant of the pro-notes, pleaded that the property in the notes had not passed to the plaintiff and could not pass without an endorsement of the notes themselves.

The District Judge of Coimbatore agreeing with the contention of the defendant dismissed the suit on the strength of the case in 11 M.

The plaintiffs appeal.

V. Bhashyam Aiyangar for appellant:—The decision in I. L. R., 11 M., is really wrong. But it is needless for the purpose of this case to go so far. The decision is verbally correct and explainable. The absence of endorsement takes away only the right of further negotiation conferred upon the endorsee by S. 50 of the Negotiable Instruments Act. The special mode of transfer provided by the Act does not take away the Common Law mode of transfer by assignment. This was decided by your Lordship (*Shephard*, J.,) in a recent Original side appeal.

P. S. Sivaswami Aiyar for respondent:—The course of authorities beginning from 11 M., is uniformly in favour of the view that a pro-note does not pass to another otherwise than by endorsement. The Act itself clearly means to do away with all other modes of transfer. S. 8 defines a holder, S. 14 defines negotiation. By negotiation a person becomes a holder and holder by S. 8 means and includes not only a holder in due course but all holders, generally, and S. 48 says that the instrument is negotiated by endorsement and delivery. These sections read together make it clear that a note will not pass to another except by endorsement and delivery.

The cases in which the contrary has been held, the Original side appeal, the case in 3 Eq. and others are explainable on the ground of

Ramachandra Rao v. Kuppusami Aiyar.

a trust existing in such cases. The cases where there are powers-of-attorney are also peculiar and stand by themselves as a separate class.

In the case in 10 C. B., 203, *The Chief Justice* and *Willes* J. hold that even inadvertent omission to endorse cannot be excused, as it would lead to a new mode of transfer injurious to the mercantile community.

Officiating C. J.:—How do you explain the 14 Common Bench case? That is clearly against you.

P. S. S.:—It may be that it came under the exceptions of a case of trust or power-of-attorney.

The Court delivered the following

JUDGMENT:—In *Pattat Ambadi Marar* v. *Krishnan* I. L. R., 11 M. 290 it was held that without indorsement there could not be negotiation of a promissory note payable to order. Here the point taken is that there was a valid transfer or assignment of the chose in action, and it is not contended that there was any negotiation of the note. According to English law it is clear that a promissory note may be assigned by the holder just like any other chose in action, the assignee taking the rights which his assignor has to convey and no more. *Whistler* v. *Forster*, 32 L. J., C. B., 163. He does not obtain the title according to Law Merchant which an endorsement would give him, nor could he before the Jurisdiction Act sue in his own name, but the transfer is nevertheless valid as an equitable assignment. There is no reason why in this country an assignee of this particular sort of chose in action should not enjoy the rights which attach to the assignee of debt and be allowed to sue in his own name.

It is argued that by the Negotiable Instruments Act any other mode of transfer than by indorsement is excluded. We can see nothing in the Act to justify this contention.

We must reverse the decree and remand the case for trial. Respondent must pay the costs of the appeal. Other costs will be provided for in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Benson.

Sambasiva Chari ... ... Appellant* (*Plaintiff*)

v.

Ramaswami Reddi .... Respondent (*Defendant*).

Sambasiva Chari *v.* Ramaswami Reddi.

Rent Recovery Act (Madras Act VIII of 1865), Ss. 18 and 51—The General Clauses Act, S. 10—The Madras General Clauses Act, S. 11—Limitation—Summary suit to set aside distraint, time for.

Summary suits under Ss. 18 and 51 of the Rent Recovery Act must be brought within the 30 days provided therein. Neither the General Limitation Act nor S. 10 of the General Clauses Act nor S. 11 of the Madras General Clauses Act applies to such suits so as to extend the time in any manner whatsoever.

A summary suit under S. 18 of the Rent Recovery Act to set aside a distraint was brought on the 31st day after the distraint, the 30th day being a Sunday

Held: that the suit was not barred by limitation on the general principle that where parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by act of the Court itself, they are entitled to do it at the first subsequent opportunity, *Shooshee Bhusan* v. *Gobind Chunder* I. L. R., 18 C., 231 and *Peary Mohun Aich* v. *Anunda Charan Biswas Ib.* 631, followed.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 241 of 1896, reversing the decree of the Head Assistant Collector of North Arcot in Summary Suits Nos, 194 to 198 of 1895.

Plaintiff sued under S. 18 of Act VIII of 1865 to set aside a distraint. The suit was filed on the 31st day after the distraint, the 30th day being a Sunday. The Courts below held that the suit was barred by limitation as, in their opinion, neither the Limitation Act nor the General Clauses Act nor the Madras General Clauses Act applied to the case.

M. Krishnamachariar for appellant.

V. C. Desikachariar for respondent.

The Court delivered the following

JUDGMENT:—We are clearly of opinion that the provisions of the Limitation Act do not apply to extend the time of 30 days limited by Ss. 18 and 51 of Act VIII of 1865 for bringing a Summary Suit to set aside a destraint. The cases at *Veeramma* v.

* S. A. 1399 of 1897. 27th September 1891.

Sambasiva Chari v. Ramaswami Reddi.

Abbiah I. L. R., 18 M., 99 and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi Ib.* 20 M., 249 and *Kumara Akkappa* v. *Sithala Naidu* 476 place the matter beyond all doubt. Nor is S. 10 of the General Clauses Act or S. 11 of the Madras General Clauses Act applicable, inasmuch as they do not refer back to Acts of the year 1865.

But there is a general principle of law which has been recognized in two recent cases by the High Court of Calcutta *Shooshee Bhusan* v. *Gobind Chunder* (I. L. R., 18 C., 231 and *Peary Mohund Aich* v. *Anunda Charan Biswas Ib.* 631) that "where parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself they are entitled to do it at the first subsequent opportunity." I. L. R., 18 C., at p. 636. We see no reason why this principle should not be followed in cases like the present, when it has been adopted as a rule of law in cases to which the Limitation Act and General Clauses Act apply. We, therefore, rule that the plaint in this case which was filed on the 31st day after the distraint was filed in time, the 30th day being a Sunday on which the Court was closed in accordance with the rules of this Court.

The decree of the lower appellate Court is accordingly reversed, and the appeal remanded for disposal on the merits.

The plaintiff's costs in this Court will be paid by the defendant and the costs incurred in the lower Courts will abide and follow the result of the further trial ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Moore.

Savithri Ammal ... ... Appellant* (2nd *Plaintiff*)

v.

Ramasami and others ... ... Respondents (1*st*, 3*rd*, and 4*th Defendants*).

Savithri Ammal v. Ramasami.

Civil Procedure Code, S. 276—Attachment, effect of—Attachment does not affect equitable rights enforceable against the property on the date of the attachment.

An attachment of property under the Civil Procedure Code does not affect subsisting equitable rights which could be enforced against the property at the date of the attachment.

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* S. A. 1059 of 1897. 5th September 1898.

The plaintiff contracted with A in August, 1891, to take a mortgage of his property and advanced money under the contract, but took no registered instrument for the same. In September, 1891, the property was attached in execution of a decree against A. In December, 1891, the plaintiff took a registered mortgage-bond for the sum he had already advanced in August, 1891.

Held;—that as the plaintiff had at the date of the attachment an enforceable contract in respect of the attached property, the rights enforceable under the attachment do not override his contract, and that a purchaser of the attached property in execution takes it subject to the plaintiff's mortgage, although the registered instrument was actually executed pending the attachment.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 300 of 1896, presented against the decree of the Court of the District Munsif of Valangiman in O. S. No. 232 of 1894.

This was a suit to realise a sum of Rs. 153-6-0 due under a hypothecation bond executed by the 1st defendant by a registered instrument, dated the 17th December, 1891. The plaintiff had previously taken an unregistered instrument for the same, in August 1891, from the 1st defendant who had agreed under that instrument to execute a validly registered mortgage and revert the consideration for the same. Between the dates of these two instruments the property was attached in September 1891, in the execution of a decree against the 1st defendant. In the execution-sale the property was purchased by the 2nd defendant who sold it to defendants 3 and 4. The Courts below dismissed the plaintiff's suit on the ground that the mortgage to him in December 1891, was made pending the attachment and was, consequently, invalid as against the auction-purchaser and his assignees. The plaintiff then preferred this appeal.

P. S. Sivaswami Aiyar for appellant.

T. M. Appu Nedungadi for *C. Sankara Nayar* for 2nd and 3rd respondents.

P. S. Sivaswami Aiyar:—S. 276 has no application to this case for two reasons. First, the mortgage deed having been executed in pursuance of an agreement prior to the date of attachment, under which agreement the whole consideration had been paid, the mortgage cannot be avoided under S. 276 C. P. C. This contention is supported by 4 M. 417.

Officiating Chief Justice:—That is a case of prior charge. Was there a prior charge in this case.

Savithri Ammal v. Ramasami.

P. S. S..—When under an imperfect instrument the whole consideration has been paid there is an equitable charge created 3 Ves 576; L. R. 5 C. P. 73; Fisher on Mortgages S. 25.

O. C. J. :—They are all cases of actual agreement. Yours is a case of actual mortgage, but not registered and therefore ineffectual.

P. S. S. :—An imperfect document though ineffectual as a mortgage is at least evidence of an agreement to mortgage especially as the consideration had been paid.

The next point is that the sale having been brought about under the attachment of 1893, the attachment of 1891 ought to be taken to have been abandoned and the mortgage deed is, consequently, valid.

Appu Nedungadi :—Under the Transfer of Property Act there was neither a mortgage nor a charge till the second document was executed and the 2nd document is invalid under S. 276. It may be that the law in England is different. The provisions of the law in India are clearly against the appellant.

O. C. J. :—Suppose the first document had been registered.

A. N. :—That is different. The Registration Act says that a compulsorily registrable document if registered within time shall speak from the date of the document.

O. C. J. :—What is the difference between such a case and this.

A. N. :—The difference is that there was in this case no charge on the property at the date of my attachment.

The Court delivered the following

JUDGMENT :—Assuming the facts to be as stated by the plaintiff and the money to have been advanced on the instrument of August 1891, before the attachment in September, we are of opinion that the attachment cannot override the right already acquired by the plaintiff. At the date of the attachment he was in a position to insist on the instrument being registered. He cannot be in a worse position, because in December he took another instrument for the same sum and had that registered. S. 276 of the Civil Procedure Code does not profess to override the general principle that a creditor cannot assert higher rights over the debtor's

property than a debtor himself possessed. The decree of the Court below must be reversed. There must be a decree as prayed for the amount claimed with costs and interest. Savithri Ammal v. Ramasami.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Seshayya ... ... Appellant* 2nd (*Defendant*)

v.

Subbamma ... ... Respondent (*Plaintiff*).

Indian Stamp Act (Act I of 1897), S. 58—Indian Evidence Act, Ss. 91 and 92—Indian Registration Act, S. 17, cl. N—Receipt of money—Proof of *aliundi*—Receipt, registration of. Seshayya v. Subbamma.

S. 58 of the Indian Stamp Act does not prescribe a receipt as the only proof of payment so as to preclude any other evidence of such payment. A person making a payment may demand a receipt, and when the receipt so given is not produced in evidence, evidence *aliundi* is admissible in proof of the payment.

A receipt for payment of money was given by a mortgagor to the mortgagee. After the mortgage-debt was discharged, the mortgagor took back the receipt with an endorsement thereon that the debt was *nil*. In a suit by the mortgagee for his debt against the mortgagor,

Held: that the endorsement did not require registration and was, therefore, admissible in evidence and that evidence *aliundi* may be given in proof of the payment and discharge.

Second appeal from the decree of the District Court of Godaveri in A. S. No. 173 of 1896, presented against the decree of the Court of the District Munsif of Tanuku in O. S. No. 302 of 1894.

Plaintiff sued defendants 2, 3, 4, on a mortgage-deed executed in her favor by defendants 2 and 4 and by the deceased husband of the 3rd defendant. Defendants 2, 3 and 4 contended that it was the 1st defendant from whom they had borrowed money and to whom they had delivered the mortgage-bond though executed in the name of the plaintiff, and had given a receipt for the money jointly in the name of the 1st defendant and the plaintiff. Subsequently, they had repayed the mortgage amount to the 1st

* S. A. 1066 of 1897. 26th Aug. 1898.

Seshayya v. Subbamma.

defendant and had taken back the receipt with an endorsement of payment on its back as having been made partly to the 1st defendant and partly to the plaintiff, who attested the endorsement. The District Munsif decreed in favor of the plaintiff against the 1st defendant and ordered plaintiff to pay the costs of the other defendants. On appeal by the plaintiff to the District Court, the District Judge held that the receipt with the endorsement thereon that the mortgage-debt had been discharged, was inadmissible in evidence for want of registration, and that secondary evidence was also inadmissible to prove the payment. He, therefore, reversed the decree of the Munsif and gave judgment for the plaintiffs against the other defendants also. On the question of registration of the receipt, he said the words "debt is *nil*" show that the receipt purports to extinguish the mortgage. Consequently, under S. 17 of Act III of 1877, the receipt should have been registered. On the question of inadmissibility of secondary evidence to prove the discharge, he said :—

By Illustration 2 to S. 91 of the Indian Evidence Act oral evidence of the payment of money is admissible. This Illustration appears to conflict with the provision in S. 91 that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself. S. 58 of the Indian Stamp Act lays down that any person receiving any money exceeding Rs. 20 shall, on demand, execute a duly stamped receipt. Thus whilst S. 58 of the Stamp Act requires that the receipt of more than Rs 20 shall be reduced to the form of a document and S. 91 of the Indian Evidence Act says that no evidence except the document shall be given in proof of such matter, Illustration *e* to S. 91 of the Evidence Act allows oral evidence as to the payment of money. In the present case the evidence is not as to payment of money but as to discharge of the mortgage. As the endorsement on Exhibit I is inadmissible in evidence, as it is not registered, secondary evidence as to the discharge of the debt is also inadmissible. I find, therefore, that the discharge of the-mortgage debt has not been proved.

The 2nd defendant then preferred this second appeal to the High Court.

V. Bhashyam Aiyangar and *T. Gopalasami Aiyangar* for appellant.

C. Ramachandra Rāo Saheb for respondent.

Seshayya v. Subbamma.

The Court delived the following

JUDGMENT:—We cannot agree with the District Judge in holding that S. 58 of the Indian Stamp Act precludes any evidence except a receipt being adduced to prove payment. It only provides that a party making a payment may demand a receipt. Even when a receipt is given and is not produced in evidence, evidence *aliunde* is admissible as the Illustration to S. 91 of the Indian Evidence Act to which the Judge refers clearly shows. There is no conflict between that Illustration and S. 92 of the Act. The Judge was also in error in holding that the endorsement on Exhibit I, was inadmissible for want of registration, for the endorsement does not purport to extinguish the mortgage. (S. 17, cl. *n* of the Indian Registration Act.)

As the District Judge, in consequence of his erroneous views on these matters, has decided the case without reference to the evidence bearing on the question of payment, we must set aside his decree and remand the appeal for disposal in accordance with law. Costs in the second appeal will be provided for in the revised decree of the District Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Moore.

Tirupatiraju ... ... Appellant* (*Plaintiff*)

v.

Rajagopala Kristnama Razu and others } Respondents (*Defendants*).

Tirupatiraju v. Rajagopala Kristnama Razu.

Hindu Law—Debt by manager of Hindu family—Contribution, suit for—Indian Limitation Act, Art. 61.

Where the manager of a Hindu family borrows and spends a debt for family purposes and is afterwards compelled by the creditor to repay the whole amount, a suit by him for contribution against his co-parceners is governed by Art. 61 of the Limitation Act, and the cause of action arises when the money is actually repaid by him.

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* A. No. 246 of 1897. 30th August 1898.

Tirupatiraju v. Rajagopala Kristnama Razu.

Appeal from the decree of District Court of Godaveri in O. S. No. 4 of 1897.

Plaintiff sued to recover from defendants contribution of their respective shares of a debt of Rs. 2,572 paid by plaintiff as manager in discharge of a family debt. Plaintiff and the defendants were co-parceners of a Hindu family who divided in 1889. Previous to the division, the plaintiff as manager of the family property had in 1881 borrowed money on a mortgage-bond. The creditor sued in 1892 and obtained a decree against him alone for repayment of the debt, and in execution of the decree he was compelled to repay the whole debt on the 31st January 1894. The present suit for contribution was brought on the 5th, January, 1897. The District Judge held that the suit was barred by limitation, as he thought that the cause of action arose from the date when the money was spent for family purposes, which must have been prior to 1889, when the family divided. The plaintiff thereupon preferred this appeal to the High Court.

V. Bhashyam Ayangar, N. Subba Rao and *K. Krishnamachariar* for appellant.

V. C. Sehachariar for respondents.

The Court delivered the following

JUDGMENT :—We agree with the Judge that the Article of the Limitation Act applicable is 61, but we find that under that Article the suit is not barred by limitation as the money, in respect of which contribution is sought, was not paid till 31st January, 1894, and this suit was brought on the 5th January 1897.

We, therefore, reverse the decree appealed against and remand the suit for fresh disposal. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar, and Mr. Justice Benson.

Thottathil Ahmmad and another ...Appellants * (*Defendants*).

v.

Muthedath Avuthraman and others ... Respondents (*Plaintiff and 1st defendant's legal representative.*

Thottathil Ahmmad *v.* Muthedath Avuthraman.

Civil Procedure Code, S. 43—Conversion, what amounts to—Cutting timber trees—Mesne profits.

Plaintiff first sued the defendant and obtained a decree for possession of a hill from which he had been evicted and for damages caused by the defendant having cut and removed certain trees from the hill. He then sued the defendant for damages in respect of trees that had been cut and removed by the defendant subsequent to the institution of the previous suit and in respect of a quantity of timber which had been stored by the plaintiff on the hill and removed by the defendant also subsequent to the institution of the first suit.

Held: that the second suit was maintainable and was not barred under S. 43, Civil Procedure Code, by reason of the first suit.

Per curiam:—In the case of land which is cultivated by growing saleable timber, profits made by a person in possession by cutting timber and selling them is mesne profits.

A trespass on a piece of land is by itself no proof of any trespass to or conversion of any moveables to be found on the land at the time the alleged trespass took place.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 659 of 1896, reversing the decree of the District Munsif of Calicut in O. S. No. 205 of 1895.

The facts of the case appear sufficiently from the Judgment of *Subrahmania Aiya J.*

K. R. Subrahmania Sastri for appellant.

C. Sanakara Nair and *B. Govindan Nambiar* for 1st respondent.

The Court delivered the following

JUDGMENTS :—*Subrahmania Aiyar,* J :—The question in this case is whether the suit is wholly or to any extent barred, because the respondent (plaintiff) did not include the items of damages, claimed here, in O. S. 507 of 1893 instituted by him against the appellant (defendant). In that suit the respondent

* S. A. No. 1065 of 1897. 13th September 1898.

Thottathil Ahmmad v. Muthedath Avuthraman.

asked for and obtained a decree for the possession of a hill from which he had been evicted and for the damages caused by the appellants' having cut and removed certain trees from the said hill. The damages now claimed are in respect of trees alleged to have been cut and removed subsequent to the institution of the previous suit and in respect of a quantity of timber which, it is said, had been stored on the hill by the respondent and which also the appellant took away after the institution of that suit. First, as to the item of the present claim relating to the trees cut and removed—Now it is scarcely necessary to say that in the case of property, such as the hill which was in question in the earlier suit, cutting saleable timber is the mode of cultivation (*Honywood* v. *Honywood*, L. R., 18 Eq., 306) and resembles, to borrow the words of *Sir Frederick Pollock*, 'taking a crop off arable land'. Consequently, the profits made by the appellant with reference to the trees cut by him while in possession, was really mesne profits. *Buneead Singh* v. *Sadaseeb Dutt*, 2, W. R., Mis. App. 50) cited for the respondent, directly supports that conclusion. And the finding is that the said mesne profits were received by the appellant since the commencement of the previous litigation.

Next, in regard to the damages claimed with reference to the timber said to have been secured on the hill, but taken away by the appellant, the argument on his behalf was this:—In evicting the respondent from the hill, the appellant necessarily dispossessed him of the timber also and, in effect, converted the same to his own use. Consequently, the value thereof should have been claimed in the present suit along with the damages therein claimed on account of trees which had been cut and removed before the institution of that suit. But a trespass on a piece of land is by itself no proof of any trespass to, or conversion of, any moveables to be found on the land at the time the trespass took place. *Non constat*, the person committing the trespass either claimed or otherwise interfered with the owner's right to the moveables. Strictly speaking, notwithstanding the respondent's eviction from the hill, the possession of the timber in question should be presumed to continue in the respondent, in the absence of proof of any act or acts on the part of the appellant, with special reference to such goods, showing unequivocally that the respondent was entirely deprived of the use of those

goods. Though the facts in the present instance are dissimilar to the facts of the cases to be presently referred to, yet the drift of the decisions in those cases seems to indicate that the view just stated is correct. In *Hartley* v. *Moxam*, 3 Ad. and Ell., 701, the defendant claimed a sum of money as due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which plaintiff held of the defendant and in which the plaintiff had put them, kept the key and refused the plaintiff access to them, saying that nothing should be removed till the defendant's bill was paid. *Cresswell,* J., being of opinion that no taking was proved which would support an action of trespass directed a non-suit and on a motion for a new trial, *Lord Denman,* C. J. *William Coleridge* and *Whitman,* J.J. upheld the non-suit. In *Thorogood* v. *Robinson,* 6 Ad. and Ell., 769, the plaintiff's goods and servants were on the land which the defendant recovered in ejectment, and the defendant on entering under the writ of possession turned the plaintiff's servants off the land and would not let them remain for the purpose of removing the goods. There was no subsequent demand or refusal. It was held that the jury might find that there was no conversion. *Lord Denman,* C. J., said "The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them. If the defendant had then refused to deliver them or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. (Ib. 722). Lastly, in *England* v. *Cowley,* L. R., 8 Ex. 126), the plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession and afterwards went to M's house to remove them. Upon his arrival at the house, he was met by the defendant M's landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It being too late for the defendant that day to distrain, he prevented the removal of the goods with a view to distrain them the next day. *Kelly,* C. B., *Bramwell,* and *Pollock,* B.B. (*Martin,* B, dissenting) held that there was no evidence of conversion and *Bramwell.* B, went the length of holding that assuming that there was an actual prevention, still the

Thottathil Ahmmad v. Muthedath Avuthraman.

action was not maintainable, and after putting several cases by way of illustration the learned Baron added, "the truth is that in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that *something* shall not be done by the plaintiff, he must say that *nothing* shall." (Ib. 130). The present case, in one view, is much weaker than any of the cases above cited, since in them there was proof of something positive—some words said or some acts done by the party charged with reference in particular to the goods said to have been converted, whereas here nothing of the kind was even alleged to have occurred with reference to the timber in question at the time the respondent was evicted from the hill. It follows, therefore, that there was then no conversion of the timber by the appellant, but that it was converted, as found by the lower appellate Court, only when after the suit of 1893 was filed he actually removed and appropriated it. The lower appellate Court is therefore right in holding that the causes of action relied on now are different from those relied on in the previous suit and, therefore, does not operate as contended for the appellant as a bar to the present claim under S. 43, Criminal Procedure Code.

I would dismiss the second appeal with costs.

Benson, J:—I agree, though not without hesitation as regards the trees cut and lying on the land at the time of the trespass.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice.

Vellanki Venkatarama Rao .... Appellant * in both cases (*1st Defendant*)

v.

Venkatasubbamma Rao and another. Respondents.

Vellanki Venkatarama Rao v. Venkatasubbamma Rao.

Civil Procedure Code, Ss. 2, 244, 583, and 588—Restitution under decree.

An order passed under S. 583, Civil Procedure Code, is appealable in the same manner as any other order passed in execution of a decree.

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* A. A. O. No. 10 of 1898. 17th August 1898.

Vellanki Venkataram Rao *v.* Venkatasubbamma Rao.

In giving restitution under S. 583, Civil Procedure Code, the Court should restore the parties to the original state of things which existed prior to the execution of the decree, and to that extent must enquire into and determine the right of the parties requiring restitution.

Appeal from the order of the Subordinate Judge's Court of Kristna in E. P. No. 584 of 1897, in the matter of O. S. No. 17 of 1883 on the file of the District Court of Kristna.

In execution of the decree in Appeal No. 40 of 1895 of the Madras High Court, the plaintiff, decree-holder, obtained possession of his ⅔rds share in the Junagadapa Estate from all the judgment-debtors (defendants). Defendants 1 and 4 appealed separately to the High Court against the order in execution and got it reversed. The 4th defendant thereon applied to the Subordinate Court for re-delivery of possession to him of the ⅔rds of the estate on behalf of himself and the 1st defendant. And the 1st defendant prayed by another petition that he should be put in sole possession of the same to the exclusion of the 4th defendant. The Sub-Judge held that it was not open to him to decide the dispute between the two defendants, and directed that two separate warrants be issued for re-delivery by mere proclamation to the two defendants of such possession as they originally had. The 1st defendant then appealed to the High Court and contended that the 4th defendant had no possession at all previous to the execution and that restitution should have been given to him alone and that the Subordinate Judge was competent to decide this dispute between him and the 4th defendant in the proceedings before him.

N. Subba Rao and *P. S. Sivaswami Aiyar* for appellant.

P. Subrahmania Aiyar for respondents.

The Court delivered the following

JUDGMENT :—It is objected that no appeal lies because orders under S. 583 of the Civil Procedure Code are not mentioned in S. 588 of the Code. But S. 583 gives no right which a successful party did not otherwise possess. It only regulates the exercise of his right of having the state of things, as it stood before the erroneous decree was passed, restored.

I think an appeal lies against the order as against any order passed in execution. The order of the Subordinate Judge is quite

Vellanki Venkatarama Rao v. Venkata Subbamma Rao.

unworkable and cannot stand. In order to replace the present appellant the Judge must determine what the nature and extent of that appellant's prior possession was, and, in that sense, he must decide the question between the two defendants.

I must reverse the order and direct the Subordinate Judge to find whether the appellant was in possession of any, or what part of, the two-third's share and, if so, whether solely or jointly with the other defendant and to pass orders accordingly.

The costs of this appeal are left to be dealt with by the Subordinate Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Venkaiya ... ... Appellant (*Plaintiff.*)

v.

Ramaswamy and another ... Respondents (*Defendants* 2 *and* 4.)

Venkaiya *v.* Ramaswamy.

Landlord and tenant—Waste—Converting character of holding—*Nanja* (irrigable) lands converted into cocoanut tope—Occupancy—Tenant's right to cultivate, unhusband-like.

The plaintiff was the inamdar of certain nanja (irrigable) lands in the North Arcot and the defendant was his tenant having a permanent right of occupancy in the land in his possession. The defendant planted cocoanut trees in a portion of the *nanja* without the plaintiff's consent and converted it into a cocoanut tope. The plaintiff then sued to direct the defendant to remove the cocoanut trees and restore the land to its ordinary state of *nanja*.

Held:—that the defendant by planting the cocoanut tope did not convert the character of the holding, nor did he by such act put the land to an unhusbandlike use.

Held further:—that the defendants' act did not amount to waste and that the plaintiff was, therefore, not entitled to a decree.

Ramanadhan v. *Zemindar of Ramnad* I. L. R., 16 M. 407.
Lakshmana v. *Ramachandra Ib.* 10 M. 351.
Kunhammed v. *Narayanan Mussad Ib.* 12 M. 320.
} distinguished.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 302 of 1896 affirming the decree of the Court of the District Munsif of Chittoor in O. S. No. 439 of 1895.*

* S. A. 1045 of 1897. 8th September 1898.

The facts of the case appear sufficiently from the judgments of the Court. Venkaiya v. Ramaswamy.

P. S. Sivaswami Aiyar for appellant.

C. V. Kumarasami Sastri and *C. V. Visvanadha Sastri* for respondents.

The Court delivered the following

JUDGMENTS :—*Moore, J.* :—The plaintiff (appellant) sued to eject the defendants (respondents) on the ground that they had converted a piece of wet land held by them on patta under him intended for cultivation with paddy, ragi, &c., into a cocoanut garden. He also prayed that he should be awarded Rs. 2 as the cost of removing the cocoanut plants on the holding. Both the lower Courts have dismissed his case with costs. In the pattas filed (Exhibit A series) the land under cultivation is classed as wet, but nothing is said as to the nature of the crops that should be grown on it. As the District Judge remarks, the plaintiff tried to import into the terms of the tenancy a clause to the effect that the tenant should not use the land for any purpose inconsistent with its general character as paddy land, and finds that the burden of proving that such a condition was one of the terms of the tenancy was on the plaintiff and that he has not discharged it.

It is now urged in appeal that the tenants have, by growing cocoanut trees on paddy land altered the character of the holding and that the landlord is accordingly entitled, if not to eject them, at all events, to get a decree directing the removal of the cocoanut plants and the reconversion of the land into ordinary wet land. It is urged that if this is not done, the amount of rent to be paid to the landlord may be diminished, that it may hereafter become impossible to identify the land and that it may also be rendered difficult for him if the land is cultivated with cocoanut trees to realize the arrears due to him by attachment and sale of the crops growing thereon under the provisions of Act VIII of 1865. It does not appear to me that there is much force in these contentions. Whatever crop the tenants may grow they must, it is clear, pay the rent agreed in the patta and no alteration in the nature of the crops can, it is admitted, give them any right to claim any deduction from that sum. There can be be no real danger that there will

Venkaiya v. Ramaswamy.

hereafter be any difficulty in identifying the land, and it does not appear to me that there is any evidence on the record to justify the supposition that the tenants who, it is shown, have a permanent right of occupancy, will run the risk of losing that right by neglecting to pay the rent due by them. It is also pleaded that if the land remains as a cocoanut tope the landlord will, in case the tenants abandon it, be put to considerable expense in having the trees cleared away so as to make it fit for the cultivation of paddy, &c. As the land is valuable, the landlord need not, as it appears to me, be under any apprehension that these tenants with a permanent right of occupancy will abandon it.

It is further urged that when the tenants planted cocoanut trees on the wet land they altered the character of the holding and thereby committed an act of waste and that such being the case the landlord is entitled to a decree as prayed for. The only cases of importance that have been quoted at the hearing are *Ramanadhan v. Zemindar of Ramnad*, I. L. R., 16, M. 407 and *Lakshmana v. Appa Rau. Ib.* 17, M. 73. What was held in the former of these cases was that a Zemindar was entitled to compel a tenant to demolish a dwelling house which he had erected for purposes not connected with agriculture on agricultural land held by him, and in the latter that a Zemindar is justified in inserting a clause in a patta preventing a tenant from erecting buildings on his holding which are not compatible with the agricultural character of the holding. These decisions, it is clear, treat of cases of a completely different nature to that at present under consideration. Turning to the latest edition of Woodfall on the Law of Landlord and Tenant (16th Edition, page 648), I find that the tenor of the decisions as to waste by changing the nature of the property is briefly as follows:—If the tenant convert arable land into wood, or *é converso*, or meadow into arable, it is waste and this would appear to be the case, even when the act is done according to the custom of the country for the purpose of amelioration. If a tenant pull down a malt-mill and build a corn-mill it is waste, also if he convert a corn-mill into a fulling-mill it is waste, though the conversion be to the lessor's advantage. Applying the principle of these decisions to the present case, it appears to me that the defendants cannot be held to have committed waste. They have not converted the holding in one of a completely different character. They have, it must, in my opinion be held, merely

chosen to grow one description of crop, cocoanuts, in lieu of another, paddy or ragi. They cannot be said to have converted "arable land into wood," inasmuch as a cocoanut garden is, it must be admitted, something very different from a wood. In many parts of Malabar one may see in a stretch of wet land fields grown with cocoanut trees intermingled with plots of paddy land. Both are irrigated in much the same way and both may, it appears to me, be held to be cultivated with wet crops. As I cannot hold that the tenants have committed waste, I would dismiss this second appeal with costs.

Subrahmania Aiyar, J. :—In this case, so far as the present appeal goes, the appellant (plaintiff)—an Inamdar,—seeks to obtain a decree directing the respondent (defendant)—a ryot,—to remove certain cocoanut trees planted by him a short time before the institution of the suit in one of the parcels of land in his possession. The District Munsif and the District Judge decided against the appellant.

Now beyond putting in the pattas issued to the respondent under the Rent Recovery Act for faslies 1299 to 1304, the appellant produced no evidence. These pattas show nothing more than what the respondent himself admits, viz., that the land in question is *nanjai* or irrigated land. On the other side, the respondent called a few witnesses to prove the prevalence of a practice, in the locality wherefrom this case comes, of persons, in the position of the respondent, planting cocoanut or other fruit trees on lands of similar description without reference to the consent of the landholder. The District Judge, however, held that no such practice was made out. The case has to be decided with reference to but three undisputed circumstances :—

1. The land has hitherto been used only for growing paddy or ragi.

2. The right, which the respondent possesses in the land, is of a permanent character though he may, if he likes, relinquish the land in accordance with the proviso to S. 12 of the Rent Recovery Act.

3. The rent payable for the land is a definite money rent which is not liable to be enhanced save for the exceptional reasons

Venkaiya v. Ramaswamy.

and under the conditions specified in the first proviso to S. 11 of the enactment referred to.

In the absence of special rules, laid down as applicable to questions such as the present arising between persons in the position of the parties to this case, we must, in dealing with such questions, be guided, as far as practicable, by the principles which govern similar questions when they arise between persons who stand to each other in the relation of landlords and tenants, in the strict sense of the terms, to which relation that subsisting between the present parties bears, in important respects, an analogy.

Now according to those principles, the appellant will not be entitled to any relief unless the respondent has, by planting the trees, contravened some agreement or understanding between him and the appellant as to the crops to be raised on the land; or unless the land has, by being so planted, been put to an unhusbandlike use; (assuming that the obligation to use in a husbandlike manner implied in certain circumstances is to be taken as an incident of the respondent's holding, a point as to which I shall add a few words later on) or unless the act of the respondent amounts to waste.

First, has the respondent by the act in question, violated any agreement or understanding between him and the appellant as to the crops to be raised? In support of the contention that he has, the only circumstance, relied on, is that, as stated before, paddy or ragi alone has hitherto been grown on the land. But clearly that by itself is not sufficient to establish the existence of an agreement or understanding that the respondent was not to use the land for the cultivation of any other suitable crop or produce. In *Westropp* v. *Elligott* (9 App. cases 815), *Lord Watson*, dealing with an argument similar to that urged here, said "though the tenant were to use the land mainly for pasture (that was the purpose for which the land had admittedly been used there for a considerable period) it would not, in my opinion, necessarily follow that the holding had been 'let to be used' for that purpose. I think it would be necessary in addition to the mere fact of use, to prove some facts in relation to the character and capabilities of the holding from which it might be inferred that the tenant could not reasonably have contemplated any other use." (*Ibid* 832). Next, has the respondent

acted in an unhusbandlike manner? This question, of course, implies that the obligation imposed by law on an ordinary tenant that in the absence of a contract to the contrary he should manage the land in a husbandlike manner, is applicable to a raiyat such as the respondent. Having regard, however, to the fact that such ryots possess in their lands a heritable and alienable interest of a permanent character, it would seem to be improper and mischievous to hold that the implied obligation, just referred to, is an incident of their holdings, inasmuch as on the one hand, it is not at all to the ryot's interest to depart from the usual and regular course of good husbandry; and on the other such a ruling might be utilized by landholders for improper ends and might lead to vexatious litigation on their parts against ryots whom they dislike. But it is not necessary to decide that point now. For, assuming that an obligation as aforesaid, is an incident of the respondent's holding, there is not a tittle of evidence to prove that in planting the trees, the respondent acted in a manner unwarranted by good husbandry. It would be quite unreasonable to hold that a tenant, who has been in the habit of raising one kind of crop for many years, by simply changing the crop does an unhusbandlike act. If authority were necessary for so plain a proposition, I would refer to *Lord Chancellor Earl of Selborne's* conclusion in the case already cited, to the effect that "the *mere fact of use in a particular manner for a considerable period of time* is not enough to show that any other use would be contrary to the covenant "to manage, till, and use the lands in a good husbandlike manner, and in due and regular course of good husbandry, so that the same might not be in any way injured or deteriorated" (9 App. cases p. 820). It may not be superfluous to add that, even if I were unaware of the fact that, in different parts of the country, notably in parts of Coimbatore, valuable topes of cocoanut and arecanut trees have been and are being grown on irrigated lands paying revenue to Government, I should decline to say, that the planting of such trees on similar lands, held by ryots in Zemindari and Inam villages, is *primâ facie* opposed to good husbandry which is a relative term, since, in the words of *Lord Ellenborough* in *Leigh* v. *Hewitt* (4 East 159), "what shall be considered in farming as good and husbandlike manner must vary exceedingly according to soil, climate, and situation."

Venkaiya v. Ramaswamy

Venkaiya v. Ramaswamy.

Lastly, does the respondent's act complained of amount to waste? It cannot be waste unless it has caused lasting or permanent injury to the appellant's right. The right to rent, which is the only tangible one that he now possesses, is obviously not affected in any way. On the contrary, as the trees grow and the value of the land increases, the security for the rent would become better and better. It is quite true that if no trees had been planted but paddy or ragi continued to be grown, the appellant would have been in a position to distrain crops of that description for any rent remaining unpaid when such crops are on the land; whereas, in the present altered condition of the land, there would be no crop on it to proceed against until the trees come to bearing. But suppose the respondent, instead of planting the trees, had merely allowed the land to reman uncultivated. In that case also the appellant would have found nothing on the land to distrain, and such an omission would have given him no legal ground for complaint. How then is he entitled to say that the absence of distrainable crops, in the case suggested on his behalf, is an injury to him? The only other argument put forward with reference to the present point, is even more unsubstantial than the one just dealt with. It may be that, if the respondent relinquishes the land at some future time and the appellant is then disposed to remove the trees, if any, then standing on the land, in order to grow paddy, &c., thereon, he would be put to a slight expense. But the contingency of any relinquishment of the land and of the removal of any of the trees is so very unlikely and the cost of the removal would be so trifling that, in my opinion, courts would not be justified in accepting such circumstances to constitute, in point of law, any injury to the appellant and much less a lasting or permanent injury. I have, consequently, no hesitation in holding that the planting of the trees does not amount to waste. It is, therefore, unnecessary to consider the contention that, even if there was waste, relief should be refused to the appellant on the ground that the waste was, as it is called, meliorating or improving waste.

As to the authorities relied on on behalf of the appellant, they are clearly distinguishable from the present. In *Lakshman* v. *Ramachendrao* (I. L. R. 10 M. 351) certain tenants from year to year were held disentitled to grow a mango grove on the land let.

This was on the ground that such tenants were under the obligation to return the land in the condition in which it was when it was leased to them. In cases like that, it does not seem unfair on the part of the landlord to say that, as the tenant's interest was determinable on notice to quit, the planting of trees that would take years to grow would ordinarily not do any good to the tenant, whilst it might prove to be a burden on the landlord who is most interested and, therefore, such trees ought not to be grown without his consent. The next case cited, *Kunhammed* v. *Narayanan Mussad* (I. L. R. 12 M., 320) is, in principle, similar to the decision just noticed. For, although the tenant, in the case in question, was not a tenant from year to year, yet he was one who had to surrender the land at the end of the customary kanom term of twelve (12) years and, under the instrument of kanom which created the tenancy, even earlier if the rent fell in arrear. The reasoning, rightly adopted, in that class of cases is quite inapplicable to cases such as the present since, in this latter class, there is no obligation to surrender at all. In *Ramanadhan* v, *Zemindar of Ramnad* (I. L. R. 16 M. 407) the ryot no doubt possessed the same permanent interest which the respondent possesses. But there, agricultural land was used as the site of a house built for non-agricultural purposes. Such an alteration the law prohibits because it is calculated to subject the landlord to risks and inconveniences pointed out by *Lord Macnaughten* in *Kehoe* v. *Marquess of Lansdowne* (1893, App. cases) and to which it is unjust to expose him. At page 466 of the report his Lordship observed, "He (the Marquess) let an agricultural holding; he must take back a congested district. 'Oh,' said the leading counsel for the appellants, 'these cottages can be easily removed; they need not subsist a day longer than anybody likes. They have only to be raised from the grounds and thrown aside.' Well, that is a summary mode of eviction which would not, I should think, commend itself to any landlord in Ireland, and which, I am sure, the appellants themselves would hesitate to put in force. The learned counsel, who spoke second for the appeal, took a more practical view; he admitted that if the land were returned to Lord Lansdowne

Venkaiya v. Ramaswamy.

with these cottages upon it, he could only get rid of them by actions of ejectment. Everybody knows what that means—expense, delay and odium! And all the time while the landlord was vindicating his rights, and probably for a very long time afterwards, the lands would lie idle and unprofitable. To my mind, that is a grave injury as well as an imminent danger." Between such a case and this, there is no similarity.

I, therefore, concur in dissmissing the second appeal with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Gilkinson and another ... ... Appellants* (*Plaintiffs*)

v.

Subrahmania Aiyar ... ... Respondent (*Defendant*).

Civil Procedure Code, Ss. 102, 103.—Dismissal for default—Appeal against order under S. 102.

Gilkinson *v.* Subrahmania Aiyar.

An order passed under S. 102 of the Civil Procedure Code is not a decree from which an appeal or a second appeal lies.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 786 of 1896 affirming the order of the Sub-Judge of Calicut in O. S. No. 15 of 1896.

The facts appear from the judgment of *Moore*, J.

A. G. Gover for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Moore*, J.—The Subordinate Judge of Calicut dismissed a suit under S. 102, Code of Civil Procedure. The plaintiff applied under S. 103 to have the order of dismissal set aside, but his application was rejected, and an appeal preferred by him against this rejection under S. 588 (Clause 8) was dismissed by the District Judge. He then preferred a regular appeal from the order of dismissal under S. 102 as if it were a decree to the District Judge who heard it and disposed of it on the merits. Against his judgment a second appeal has been preferred here. It is now urged on behalf of the respondent that there was no appeal to the District Judge from the order passed under S. 102 and that, consequently, there is no second appeal here.

This contention is, in my opinion, a valid one. It must be held that an order passed under S. 102 is not a decree (vide *Mansab Ali* v. *Nihal Chand*, I. L. R., 15 A., 359). Reference should also be made to the decision of their Lordships of the Privy Council in *Chand Kour* v. *Partab Singh*, I. L. R., 16 C., 98, where it was held

* S. A. 1661 of 1897. 20th October 1898.

Gilkinson *v.* Subrahmania Aiyar.

that "the dismissal of a suit in terms of S. 102 was plainly not intended to operate in favour of the defendant as *res judicata*" and to an unreported decision of this Court (Appeal against order 140 of 1892) where the ruling in 15 Allahabad is approved and followed.

It is further urged that although it is the case that the 23rd September, 1896 (the day on which the suit was dismissed for default) had been fixed for settlement of issues, yet it should be held that this arrangement was superseded by a further order of the Court directing that the application on the part of the defendant praying that the plaintiff should be directed to amend the plaint should be heard on the same day. There does not appear to be anything in this argument. On the 4th September, the defendant put in the petition just mentioned and the order passed on it by the Subordinate Judge was that the question raised would be considered at the first hearing and that "notice should be sent to the plaintiffs for the 23rd." It is impossible to hold that by this order the Subordinate Judge "superseded" the order fixing the 23rd September for the first hearing or that the plaintiffs could reasonably have supposed that he had done so.

On the ground that the order passed under S. 102 of the Code of Civil Procedure was not a decree, it must be held that there was no regular appeal to the District Judge and that, consequently, there is no second appeal here.

This petition must be dismissed with costs.

Subrahmania Aiyar, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Groves and others ... Appellants * (*Counter-Petitioners* 1 to 3)

v.

The Administrator-General of Madras ... Respondent (*Petitioner*).

Groves *v.* Administrator-General.

Civil Procedure Code, Ss. 234, 244, 298—Sale of judgment-debtor's property after judgment-debtor's death—Nonjoinder of representative, validity of.

A sale of moveable property (debt) held in execution of a decree is void, where at the time of the actual sale, the judgment-debtor is dead and his legal representa-

* A. A. O. No. 7 of 1893. 19th Ocotober 1898.

tives are not brought to the record, even though the order to sell may have been passed before the judgment debtor's death. Failure to bring in the legal representatives under such circumstances is not a mere irregularity covered under S. 298, Civil Procedure Code, but the sale of the deceased judgment-debtor's property without his legal representatives on the record is void *ab initio*.

Groves v. Administrator-General.

Appeal from the order of the Subordinate Judge's Court of Ootacamund, passed on M. P. No. 78 of 1896 in No. 74 of 1894.

The facts appear from the judgment of *Boddam*, J.

W. Barton for appellants.

K. Brown and *Barclay, Orr and David* for respondent.

The Court delivered the following

JUDGMENT :—*Boddam*, J.—This is an appeal from an order of the Acting Subordinate Judge of Nilgiris on a petition presented on the 6th July, 1896, by the Acting Administrator-General of Madras under S. 244, Civil Procedure Code, to set aside a sale in execution which took place on the 8th July 1895.

The facts are as follows:—One Harvey owed Rs. 70,000 to Richard Woolley, and in March 1893 he executed a power of attorney to Richard Woolley authorising him to dispose of his coffee estates and pay himself. In April 1893, however, Harvey took P. W. Woolley, a son of Richard Woolley, into partnership with him. In October, 1894, Richard Woolley agreed with Harvey and P. W. Woolley not to exercise his rights under the power of attorney until 1st June 1896 but in the meanwhile they were to pay him 10 per cent. interest instead of 8 per cent. per annum. In November, 1894 one Groves, who had commenced an action for a debt of Rs. 17,342 against Richard Woolley (C. S. No. 74 of 1894), applied for and obtained an attachment order (Exhibit B) before judgment of Harvey's debt, prohibitory orders (Exhibits A and H) being issued to Harvey and Richard Woolley on the 27th November, 1894. On the 22nd January 1895, Groves got judgment and on the 26th February, 1895, applied for execution of his decree by sale of the debt and the sale was ordered for the 18th March 1895. In the meanwhile R. G. Carbry and W. Johnson had obtained a decree against R. Woolley in O. S. No. 13 of 1894 in the District Court of Coimbatore for Rs. 8,059. Their decree was transferred for execution to the Subordinate Judge's Court of Ootacamund

Groves v. Administrator-General.

and the same debt was attached. The sale ordered for the 18th March was stayed pending the hearing of a petition by R. Woolley to the High Court, but this having been dismissed it was on the 3rd May, 1895, ordered to proceed and on the 4th May 1895 sale proclamation was issued for the 20th May 1895.

On the 11th May 1895 Richard Woolley, the defendant, died in England leaving a will and codicil whereby he appointed three executors one of whom was P. W. Woolley, his son.

On the 20th May 1895, P. W. Woolley presented a petition under S. 234 of the Civil Procedure Code stating that his father was dead, that the executors would soon apply for probate and asking that the sale should be postponed in order that the executors may be joined. His petition was dismissed. On the same day Messrs. Carbry and Johnson applied for execution of their decree by sale of the same debt. Whether or not any order was made on this petition is by no means clear, nor is it in any way material for the sale had already been ordered in O. S. No. 74 of 1894 to take place on this 20th May. The sale commenced and was conducted from the 20th to the 23rd but no bidders came forward and it was consequently adjourned. On the 7th June, 1895, a fresh proclamation was issued fixing the sale for the 8th July 1895, the property to be sold being described as "a debt of Rs. 70,000 "due by H. F. Harvey to the judgment-debtor and secured by an "irrevocable power of attorney and mortgage of certain estates in "Wynaad." In the meanwhile P. W. Woolley and his sister applied for probate of their father's will and an arrangement was made to transfer the administration to the Administrator-General of Madras after grant of probate. Prior to the sale taking place the decree-holders in the two suits entered into an agreement with Harvey and P. W. Woolley to bid at the sale and after purchase to assign the same to Harvey and P. W. Woolley for the same amount for which they might purchase it. At the sale the decree-holders were the only bidders and purchased the debt for Rs. 30,682-8-0 and this amount was credited to the two decrees and they assigned their interest (in accordance with their previous agreement) to Harvey and P. W. Woolley after having got the Court to issue notices under S. 301 of the Civil Procedure Code to Harvey and the Administrator-General to whom the administration of the estate

Groves v. Administrator-General.

of Richard Woolley had been transferred on the 9th September, 1895.

Now it is apparent on this state of facts that the debt of Rs. 70,000 due from Harvey to the estate of Richard Woolley has been sold to Harvey and his partner P. W. Woolley for Rs. 30,682 and that the estate of Richard Woolley has lost the balance amounting to nearly Rs. 40,000, the purchasers (the persons benefited) being the debtor and P. W. Woolley his partner to whom probate was originally granted and the estate of R. Woolley losing more than half the debt.

It is also apparent that the Subordinate Judge has made a mistake in the facts upon which his judgment is based. He states that R. Woolley died prior to the order for sale. This is not so. The order for sale, as is apparent from Exhibit L, was made on the 26th February, 1895, and though the sale was stayed by the High Court it was on the 3rd May, 1895, ordered to proceed and the sale proclamation was issued on the 4th May, 1895 for the sale on the 20th May, whereas Richard Woolley did not die till the 11th May 1895 and though the sale on the 20th May 1895 proved abortive and was adjourned till July 1895 no fresh order for sale was made after the 3rd May which was prior to his death.

It was argued before us that the sale was void inasmuch as at the time of the sale the person to whom the debt was due, the judgment-creditor, was dead and there can be no sale of a dead man's rights, that at the time of the sale the property that was of the dead man was vested in his executors and as they were not brought on the record or made parties no interest which was vested in them at the time of the sale was sold.

On the other hand, it was argued that the effect of selling the debt without the executors being joined was merely an irregularity in publishing or conducting the sale and the only remedy was under S. 298, Civil Procedure Code, by action.

If the argument of the petitioner is well-founded, it is clear that this is not a mere irregularity in publishing or conducting the sale and S. 298 does not apply.

The difficulty in deciding the question lies in adverse decisions which have been come to upon the question. There are cases

Groves v. Administrator-General.

decided in each of the other High Courts which practically decide the question adversely to the petitioner's contention (though all the cases do not turn upon S. 298), whereas the Madras High Court has practically decided the question the other way.

The Subordinate Judge in his judgment says "In regard to the property sold it is not disputed that it was a simple debt due to the deceased judgment-debtor and secured by an irrevocable power of attorney and that it was sold as a mere debt." If that is so the only thing that was sold was the right of a dead man to be paid a debt. In *Ramaswamy Ayyangar* v. *Bagirathi Ammal*, I. L. R., 6 M., 180, it was held that where a judgment-debtor died after his land had been attached and the judgment-creditor brought the land to sale without making the representatives of the deceased parties to the proceedings the sale was illegal and ought to be set aside. Again, in *Krishnayya* v. *Unnissa Begam*, I. L. R., 15 M., 399, where a decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made and the sale proceeded though the execution-debtor died before the sale, his representatives not having been brought on to the record, it was held that the sale was void and must be set aside. This case is absolutely on all fours with the present case and would decide the question; but the Full Bench case in *Sheo Prasad* v. *Hira Lal*, I. L. R., 12 A., 440, was not cited or referred to and as that case decides exactly the contrary, though it does not bind us, we have to determine which is right.

For myself (and I say it with all respect to the Judges who constituted the Court), I think the reasons given for the decision of the Allahabad High Court are wrong. The fact that property attached is in the custody of the law does not vest the property in the Court. The attachment does not effect the legal devolution of the property; it only gives at the best the custody of the property, without affecting the right to the property, to the Court. Where the property is a mere chattel which passes by delivery possession of the property may be sufficient to pass the property, but where the possession of the property may be rightfully in one person though the title to the property is in another, this does not apply.

In the present case the only thing sold was the right of a dead man which passes no property, as the dead man had no right at

the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record.

Groves v. Administrator-General.

Section 234 of the Civil Procedure Code says if a judgment-debtor dies before a decree has been *fully* executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives. The Allahabad High Court hold that this does not apply to cases where the judgment-debtor dies after attachment but before sale. I cannot understand why. Take the present case. It cannot be said that the decree had been fully executed until the sale took place, and if the decree has not been fully executed the section applies. If an execution-creditor does not choose to avail himself of this section, he must take the consequences. In the present case if the sale had been postponed, as in fact it was, the first sale having proved abortive, until probate was taken out and the executors P. W. Woolley and his sister had been joined, it is more than probable that the attachments would have been satisfied and no sale would have been necessary, the result being that the executors or the Administrator-General acting for them would have had an opportunity of recovering something for the benefit of the estate of R. Woolley, deceased.

In *Narayana Kothan* v. *Kalianasundaram Pillai*, I.L.R., 19 M., 219, the judgment of *Subrahmania Aiyar*, J., rather supports this view though the case is under a different section and the judgment-debtor did not die but was declared insane before the sale. Now let me consider what will be the effect if the sale is declared void. The assignees of the purchasers knowing the facts before the sale agreed to buy what was sold for the price bid by the actual purchasers who were the judgment-debtors and they have paid the judgment-debtors' debts in order to acquire whatever they bought. If they so bought they cannot recover anything from the judgment-debtors, though the actual debtor to the estate may become liable to the Administrator-General for the balance of the debt.

On the merits, therefore, as well as on the law, I have come to the conclusion that the sale should be set aside.

Davies, J.—I entirely agree with my learned colleague that the legal representatives of the deceased should in such cases be

Groves v. Administrator-General.

placed on the record before sale and that in this case the sale was vitiated by the omission; for if P. W. Woolley had been brought in as the executor of his father's estate, he would not have been able to enter into the arrangement that he did as P. W. Woolley, the debtor to his father's estate; by which he endeavoured to reduce his own liability to his father's estate by some Rs. 40,000.

The appeal is therefore dimissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Krishnan and another ... Appellants * (*Plaintiffs*)

v.

Govinda Menon and others ... Respondents (*Defendants*).

Krishnan v. Govinda Menon.

Malabar Law—Karnavan, duties of—Education—Maintenance.

It is not incumbent on the karnavan of a Malabar tarwad as part of his duties with reference to its members to give them education through the medium of the English language and on Western lines.

The plaintiff, a junior member of a Malabar tarwad went out of the tarwad house to get himself educated in an English School in a different place. The defendant karnavan of the tarwad did not supply him with money for the necessary expenses during his stay in that school. The plaintiff now sued for the expenses incurred by him for maintenance and school fees while at the latter place.

Held, that the plaintiff was not entitled to recover.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 126 of 1897 affirming the decree of the District Munsif of Angadipram in O. S. No. 135 of 1896.

This was a suit to recover from the tarwad of the plaintiffs and defendants Rs. 165 said to have been borrowed by the 2nd plaintiff for the education of her son, the 1st plaintiff, from January, 1895, to April, 1896. The plaint alleged that from 1889 to 1894 the 1st plaintiff was educated at a school in Angadipram with tarward funds, but that afterwards the 1st plaintiff went to school at Palghat without the consent of the karnavan who refused to pay for his expenses at the latter place. The defendants pleaded that the 1st plaintiff had not been sent to school with their consent and

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* S. A. No. 2007 of 1897. 1st November 1898.

Krishnan v. Govinda Menon.

that they were not bound to pay for his education. The Courts below dismissed the suit. The plaintiffs then preferred this second appeal.

T. M. Appu Nedungadi for appellants.

P. R. Sundaraiyar for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT:—The suit, though framed very inartistically was apparently treated by both the parties in the lower Courts as a suit for arrears of maintenance for the period during which the 1st plaintiff resided in Palghat for the purposes of education. Part of the amount claimed is at all events what was spent in connection with his maintenance in the very limited sense of the term. We are unable to say that the view taken by the lower Courts as to the character of the suit is wrong. We accordingly overrule the objection that the suit is of the nature of a case triable by a Small Cause Court and, therefore, no second appeal lies.

Upon the merits also, we agree with the lower appellate Court. The question as to what the duties of a karnavan are with reference to the education of the different members of the tarwad is a large one as to which little or no authority is to be found. It is essentially one which in particular cases would depend upon its own circumstances. No general rules can, therefore, be laid down on the subject. So far as the present case goes, it appears that the karnavan did not absolutely decline to educate the plaintiff. He was ready and willing only to give such education in his own place as was practicable there. The 1st plaintiff, however, having without the consent of the karnavan removed to Palghat to attend the school there in order to be taught English, the question is whether the karnavan was bound to pay the expenses connected with such education. Unless, as contended for the appellant, a karnavan is to be, as a rule, held bound to give education through the medium of the English language and on Western lines, to borrow the words of the Subordinate Judge, this second appeal must fail; and we have no hesitation in holding that such education has not become essential in the sense that it is incumbent on a karnavan to provide for it as part of his duties with reference to the members of the tarwad.

We cannot, therefore, say that the karnavan here went beyond his powers in declining to meet the expenses to which this suit mainly relates. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Mayandi Chetty ... ... Appellant* (*Plaintiff*)

v.

Samia Pillai and others ... ... Respondents (*Defendants*).

Mayandi Chetty *v.* Samia Pillai.

Novation—Trustee's obligation, extinguishment of—Presumptions.

The defendant's sister gave him some lands burdened with a trust for the payment of a sum of Rs. 100 to a certain temple. Subsequently, the defendant hypothecated the same lands to the trustees of the temple and agreed to pay the sum within a certain time with interest at 3 per cent. per annum and, in default of payment, with interest at 24 per cent. per annum. The hypothecation deed was not registered. In a suit by the trustees for the recovery of the amount more than six years from the date of the hypothecation bond.

Held:—that the execution of the hypothecation bond by the defendant did not in any way alter the trust obligation which he was bound to perform and that the plaintiff was entitled to recover as under the trust.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 696 of 1896, reversing the decree of the District Munsif of Negapatam in O. S. No. 236 of 1895.

The facts appear from the judgment of *Subrahmania Aiyar*, J.

P. R. Sundaraiyar for appellant.

T. Ethiraja Mudaliar for respondent.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar*, J.—The point for decision in appeal is whether the respondent's liability as trustee to pay to the appellant the sum of Rs. 100 in accordance with the directions of the respondent's sister who left him her property subject to that trust, was extinguished as found by the District Judge. No evidence, oral or documentary, appears to have been produced to show that there was between the parties any agreement to extinguish that liability. The sole circumstance in which the Judge's decision that it was extinguished rests is the fact that subsequent to the creation of trust, the appellant took from the respondent, Exhibit A, a hypothecation bond for the sum in question which was made payable within a

* S. A. No. 1602 of 1897. 20th October 1898.

Mayandi Chotty v. Samia Pillai.

year from the date of the document with interest at 3 per cent. per annum and enhanced interest at 24 per cent. in default of payment within the time fixed. Now, is this circumstance by itself sufficient legal evidence to show that the parties had come to an agreement that the trust obligation was to cease. The rules bearing on questions like the present will be found succinctly stated in Pothier on Obligations and Donat's Civil Law in those parts of the treatises where the learned authors deal under the head of novation, with the subject of creditors and debtors agreeing to substitute a fresh obligation for a pre-existing one. Pothier observes "If, subsequent to the contracting of a debt some act passes between the debtor and creditor, allowing a further time, or appointing a different place for payment, or authorizing a payment to some other person than the creditor or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum or the creditor to accept a smaller, in these and similar cases according to the principle that a novation is not to be presumed, it should be decided that no novation has taken place, and that the parties intended to modify, augment or diminish the obligation and not to extinguish the old debt and substitute a new one unless the contrary is particularly expressed (Vol. I, pages 386 and 387, Edn. of 1806)." Donat states the rule to the same effect, thus "There is never any novation produced by the bare fact of a second obligation unless it appears that the creditor or debtor have had an intention to extinguish the first. For otherwise both obligations will subsist. If the creditor and debtor agree to make some change in a former obligation whether it be by adding to it a mortgage, a surety, or some other security, or by taking the same away, whether it be by augmenting or diminishing the debt or by fixing a longer or shorter term of payment or by making the debt conditional if it was pure and simple, and simple if it was conditional. All these changes and others of a like nature do not make any novation, because they do not extinguish the first debt, unless it were expressly said that it should be null, and the first obligation subsists although it be not particularly mentioned that it is reserved, or that the said changes are made without an intention to innovate (Vol. 2, paragraphs 2306, 2307)."

It follows from the above statements of the law that the presumption against the extinction of the respondents' prior obligation

Mayandi Chetty v. amia Pillai.

is not rebutted by the appellants having accepted Exhibit A from the respondent without more. The view taken by the District Judge cannot, therefore, be supported.

We must reverse the decree of the lower appellate Court and restore that of the District Munsif with the modification as to the rate of interest which will be 6 per cent. per annum instead of 24 per cent. since that rate cannot be awarded, the right to claim it under Exhibit A being barred by limitation. The respondent will pay the appellant's cost in this and the lower appellate Court.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Moore.

Nagammal and others ... ... Appellants * (*Defendants* 2 to 4)

v.

Venkatagiri Aiyar ... ... Respondent (*Plaintiff*).

Nagammal v. Venkatagiri Aiyar.

Mortgagor and mortgagee—Subsequent mortgagee, rights of—Party to suit by first mortgagee—Form of decree in subsequent mortgagee's suit—Right of auction-purchaser—Improvements.

In an auction-purchase in execution of a mortgage-decree, the purchaser takes both the interest of the mortgagor and of the mortgagee in whose favour the decree was passed.

Where a suit is brought by the first incumbrancer against his mortgagor and a decree is obtained without the subsequent incumbrancer being made a party to the suit, the latter is not bound by the decree in the suit; and in a suit by him for his mortgage amount he is entitled to have the same decree he would have had if he had been made a party to the first suit. In such a suit he will be entitled to re-open the account between the mortgagor and the first mortgagee and he will not be concluded as to the value of the property by the original sale.

The plaintiff was a subsequent mortgagee. The defendants were auction-purchasers of the mortgaged properties in execution of a decree obtained by a prior incumbrancer in a suit to which the plaintiff was no party. Since the purchase the defendants had made some improvements in the property which were not such as a mortgagee with possession would have been entitled to charge against the mortgagor. In a suit by the plaintiff for his mortgage-money by sale of the mortgaged property :—

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* S. A. No. 1296 of 1897. 13th September 1898.

Nagammal v. Venkatagiri Aiyar.

Held: that a decree should be passed directing the plaintiff to pay to the defendants the original mortgage amount with interest, and on such payment, the property be sold and the sale proceeds applied first in satisfaction of the plaintiff's mortgage-debt and the surplus, if any, be handed over to the defendant as representing the mortgagor's interest; and that in default of such payment by the plaintiff, the suit stand dismissed.

Held, further, that the defendants were not entitled to credit for money spent by them for the improvements.

Second appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in A. S. No. 213 of 1896 presented against the decree of the District Munsif of Salem in O. S. No. 510 of 1894.

The facts appear from the judgment of *Mr. H. H. Shephard,* O.C. J.

T. Rangachariar for appellant.

C. Sankara Nair and *T. S. Tyagaraja Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The respondent, plaintiff in the suit, is the holder of a simple mortgage, dated the 4th June 1888. The appellants have become possessed of the property comprised in this mortgage by purchase from the vendee who bought at the auction-sale in execution of the mortgage-decree made in O. S. No. 236 of 1890. This latter mortgage was executed in 1887.

The price settled at the auction-sale in 1892, *viz.,* Rs. 600, was not sufficient to pay off the amount due under the mortgage-decree. The valuation of the property by the District Munsif made since certain improvements had been effected by the appellants leaves a margin beyond the amount required to satisfy the mortgage-decree. The appellants claim that in the decision of any question between themselves and the respondent credit should be given them for the amount spent on these improvements, and it is convenient to dispose of this question first, for if it were decided in the appellant's favour, the suit ought to be dismissed as it practically was by the District Munsif. Except upon the supposition that there is a margin of value beyond the amount of the first incumbrance, it is plain that the second incumbrancer can so far as the mortgaged property is concerned have no remedy. I am, however, of opinion that the Sub-judge was right in holding that the appellants are not entitled to credit for

Nagammal v. Venkatagiri Aiyar.

money spent on improvements. As purchasers of the property the appellants cannot be in a better position than the mortgagor, and he clearly could not have charged for improvements. As mortgagee in possession the appellants have not proved that the nature of the improvements was such as to justify them in charging the cost against the mortgagor or those who derive their title from him. It must be taken, therefore, that the property as it now stands would realise a sufficient sum to allow for payment in part of the respondent's claim after the claim in the first mortgage is satisfied. In other words, after both mortgagees are paid off, there will probably be nothing left for the appellant in whom the equity of redemption is vested.

In cases such as the present where a second incumbrancer has not been made party to a prior suit and is, therefore, not bound by the decree passed therein, it appears to me that while the purchaser in execution of that decree must be treated as if he had bought privately the interests of the mortgagor in the first mortgagee, a decree should be made in the form in which it would have been made if the second incumbrancer and the purchaser had both been parties to the original suit. The position of the second incumbrancer should not be worse than it would have been if there had been no previous suit. Therefore, it is open to them to question the account taken between the first mortgagee and the mortgagor and he is not concluded as to the value of the property by the sale which has followed upon the decree. On the other hand, he is not to be in a better position, and therefore, before he can enforce his mortgage right against the property, he must still pay off the amount secured by the first mortgage, whether or not, that amount exceeds the purchase-money. That would clearly be so where the mortgagor himself is clearly the purchaser, and I think it cannot be otherwise when the property is as here purchased by a stranger. The purchaser is supposed to take the interests in the property which the mortgagor and the mortgagee together could convey, and therefore, although money may still remain due to the mortgagee, no interest in the property is retained by him. (*Dip Narain Singh* v. *Hira Singh*, I. L. R., 19 A. 532.) Accordingly, the decree should be so framed as to give the respondent the usual six months for paying the appellants the amount secured by the appellants' mortgage together with

interest at 6 per cent. thereon from the date of the decree in the suit of 1890, and should direct that, on such payment being made, the property should be sold and the sum due to the respondents' mortgage with interest and costs paid out of the proceeds, and the surplus, if any, paid to the appellants. In the other event, *i.e.*, on default of payment by the respondent his suit should stand dismissed with all costs. Nagammal v. Venkatagiri Aiyar.

Moore, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Benson.

Odayana Tevar ... ... Appellant* (*Plaintiff*)

v.

Thandavaraya Thambiran ... ... Respondent (*1st Defendant.*)

Odayana Tevar v. Thandavaraya Thambiran.

Compromise of suit—Compromise conditional and absolute—Procedure to be adopted in case of a conditional compromise.

The parties to a suit filed a razinamah one of the terms of which was that the Court should pass a decree in accordance with it. The razimanah did not give the plaintiff any of the reliefs claimed in the suit, but dealt with various matters not the subject-matter of the suit.

Held: that the suit should not be dismissed because the razinamah could not be embodied in a decree, and that the proper course for the Judge is to inform the parties of the fact and to ascertain from them or upon further evidence, if necessary, whether the compromise was intended to be absolute or conditional on its being incorporated in a decree. In the latter case the Judge should proceed with the suit.

Appeal from the decree of the Subordinate Judge's Court of Madura (East) in O. S. No. 53 of 1895.

The facts appear from the judgment of the Court.

S. R. Ramasubba Aiyar for 2nd appellant.

P. R. Sundaraiyar, and *K. Srinivasa Aiyangar*, for respondent.

The Court delivered the following

JUDGMENT:—We are clearly of opinion that the lower Court was right in holding that a decree could not be passed in the

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* A. No. 222 of 1897. 1st September 1898.

Odayana Tevar v. Thandavaraya Thambiran.

terms of the compromise, inasmuch as the compromise did not give to the plaintiff any of the reliefs claimed in the suit, but dealt with various matters, not the subject-matter of the suit.

It is, however, contended for the respondent that the Subordinate Judge was right in dismissing the suit as a necessary result of the compromise between the parties. But this contention assumes that the compromise was an absolute one, independent of the question whether the Court could pass a decree in its terms. We do not think it at all clear that such was the intention of the parties. The request that a decree should be passed in the terms of the compromise is contained in the document of compromise itself and would, therefore, appear to be one of its terms. If so, it would be a condition precedent to the compromise being effected that it should be included in the decree. The intention of the parties on this point, as we have observed, is not clear and we think that the Subordinate Judge before dismissing the suit should have informed the parties that the terms of the compromise could not be embodied in a decree and should have ascertained from them or upon further evidence, if necessary, whether the compromise was absolute or conditional on its being incorporated in a decree. In the latter case, he would, of course, have proceeded with the suit. We shall, therefore, reverse his decree and direct him to dispose of the suit afresh in accordance with the above observations.

Costs already incurred in both Courts will be provided for in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Benson.

Sivasankaram Pillai ... ... Petitioner* (*Plaintiff*)

v.

Panchami Kesiyar ... ... Respondent (*Defendant*).

Siva-sankaram Pillai v. Panchami Kesiyar.

Benamidar, maintainability of suit by.

The plaintiff, assignee of a debt, sued the debtor for the money. It was proved that the assignment in favor of the plaintiff was really intended for the benefit of his master, whose money formed the consideration for the assignment.

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* C. R. P. No. 145 of 1898. 26th October 1898.

Held that the plaintiff was entitled to recover notwithstanding that he was a mere benamidar. Siva-sankaram Pillai v. Panchami Kesiyar.

Per Curiam :—" Provided that the defendant is not in any way prejudiced and is allowed to raise any defence which would avail him against the person really entitled, there seems to be no objection to such a suit.

Civil revision petition from the decree of the Subordinate Court of Madura (West) in S.C. No. 1099 of 1897.

This was a claim for Rs. 190-13-0, principal and interest, due on a registered deed of assignment executed to the plaintiff by one Mustapha, Ravuther. It appeared from the evidence of the assignor that plaintiff was merely a benamidar for his employer, Ibray Revuthan and that the assignment was obtained for the benefit of the latter and with his money. The Subordinate Judge, therefore, held that the plaintiff had no right to sue and, therefore, dismissed the suit. The plaintiff then preferred this revision petition to the High Court.

Joseph Satya Nadar for petitioner.

R. Subrahmania Aiyar for respondent.

The Court delivered the following

JUDGMENT :—As far as we can see, the suit was dismissed on the mere ground that a witness, *viz.*, the assignor, said that the plaintiff was a benamidar for Mahomed Ibray Ravuthan. Assuming that to be true, we do not think it is sufficient ground for dismissing the suit. We are not aware that it has ever been held that a benamidar may not sue in his own name to recover a debt. Provided that the defendant is not in any way prejudiced and is allowed to raise any defence which would avail him against the person really entitled, there seems to be no objection to such a suit. It might even be necessary in the interests of the defendant to have the real party joined. Here it does not appear that any objection was taken by the defendant.

We must reverse the decree and remand the suit for disposal on the merits. Costs to abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar, and Mr. Justice Moore.

Zamindar of Tuni ... ... Appellant* (*Plaintiff*)

v.

Bangaru Peda Bennayya and others ... Respondents (*Defendants*).

Zamindar of Tuni *v.* Bangaru Peda Bennayya.

Civil Procedure Code, Ss. 2, 541, 543, 582—Rejection of appeal memorandum—Scandalous matter—Appeal—Scandalous matter, what—Partiality of Judge, ground of appeal.

An appeal lies from an order rejecting an appeal memorandum on the ground that it contains scandalous matter. *Ayyanna* v. *Nagabhooshanam*, I. L. R., 16 M., 285, referred to.

Per Subrahmania Aiyar, J.—When a memorandum of appeal contains scandalous matter the Court has no power to reject the memorandum especially in cases where the scandalous matter is separable from the rest. All that it can do is to ask the appellant to remove the objectionable matter, and if he should refuse to do so, itself have it expunged.

Bias on the part of a Judge ought not to be allowed to form a ground of appeal for impeaching his decision. It is no doubt open to an appellant to set up circumstances showing that the Judge whose decision is appealed against was disqualified from trying and deciding the case. But it is not open to him to show that in the particular case he was biassed in fact.

Per Moore, J.—When a Court finds scandalous matter in an appeal memorandum which in its opinion should be *expunged*, the proper course for it to take is to return the appeal petition to the appellant and refuse to receive it until the matter is expunged. It is no part of its duty to revise the memorandum itself.

Second appeal from the order of the District Court of Vizagapatam, on the appeal petition presented to that Court from the decree of the Court of the District Munsif of Yellamanchilli in O. S. No. 621 of 1895.

The facts appear from the judgment of *Subrahmania Aiyar*, J.

M. K. Vaidyanatha Aiyar for appellant.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar*, J.—The appellant before us was the appellant in the lower appellate Court also. The memorandum of appeal, presented by him there, was returned to him for amendment on the ground that it contained language

* S. A. No. 1655 of 1897. 20th October 1898.

Zamindar of Tuni v. Bangaru Peda Bennayya.

disrespectful to the Court of First Instance. It was, however, represented without amendment accompanied by a statement or petition to the effect that the imputations made in the paragraphs 1, 3 and 12 of the memorandum which were objected to, were borne out by the record and, therefore, they ought to be allowed to remain so as to entitle the appellant to rely upon them at the hearing; but that, if the Court still thought otherwise, the Court itself may direct them to be scored out.

The lower appellate Court thereupon rejected the memorandum under S. 543 of the Code of Civil Procedure.

The first point for determination is whether an appeal lies against the order of rejection. Now, S. 543, referred to, is apparently limited to cases in which the memorandum of appeal is not drawn up in accordance with the second paragraph of S. 541, which runs thus :—"Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed against without any argument or narrative; and such grouuds shall be numbered consecutively" (see *Gulab Rai v. Mangli Lal*, I. L. R., 7 A. 42). The objection here, however, is that the memorandum contains scandalous matter and as the paragraph just quoted cannot be said to lay down any rule with reference to such a breach of the rules governing the frame of pleadings, S. 543 would seem to be inapplicable to a case like this. However this may be, the order appealed against must, following *Ayyanna v. Nagabhooshanam*, (I. L. R., 16 M. 285,) be held to be a decree within the meaning of the Civil Procedure Code. The objection that no appeal lies, therefore, fails.

The next point for decision is whether, assuming that the memorandum of appeal is open to the objection taken by the District Judge, he had power to *reject* the appeal. No doubt the Code of Civil Procedure does not make any provision as to how Courts should deal with memoranda of appeal containing scandalous matter. But clearly Courts possess inherent power to stop such an abuse of its records. For, as pointed out by Story, "Scandal is calculated to do great and permanent injury to all persons, whom it affects, by making the records of the Court the means of perpetuating libellous and malignant slanders; and the Court, in aid of public morals, is bound to interfere to suppress such indecencies" (Equity pleadings,

Zamindar of Tuni v. Bangaru Peda Bennayya.

§ 270). There can be no doubt, therefore, that it was perfectly competent to the lower appellate Court to have caused the objectionable passages, if any, in the memorandum to be expunged. But had the Court power to reject the appeal altogether? No such power is given to the Courts by any statutory provision. And, on general principles, it is not possible to hold that Courts have such power, at all events, in cases in which the objectionable matter is separable from what is unobjectionable. It seems to me that all that a Court is entitled to do in such cases is to cause the portions open to objection to be expunged. For, even taking that an appellant, by refusing to comply with an order for amendment such as that passed in the present instance by the District Judge, is guilty of a contempt, still it cannot be said that until the contempt is purged the party cannot be heard and is debarred from claiming that the appeal be proceeded with. [*Ricketts v. Mornington,* (7 Simon 200); *Wilson v. Bates.* (3 My. & Cr. 197) and *Haldane v. Eckford,* (L. R., 7 Eq. 425)], in my opinion, support the above view. In the last mentioned case, the defendant was held entitled to take any step required for the purposes of his defence, although the contempts committed by him were of the most flagrant kind. I am, therefore, of opinion that, assuming that the memorandum of appeal in question does contain scandalous matter, still it was not open to the lower appellate Court to reject the appeal, the alleged objectionable portions of the memorandum being quite separate from the rest.

The third and last point for consideration is whether the memorandum does contain scandalous matter. In dealing with a question like this two rules have to be borne in mind, *viz.*, that, as urged for the appellant, what is relevant cannot be scandalous and that Courts ought not to dictate to parties how they should frame their cases, provided of course the rules of pleading are not contravened in the frame of their cases—the latter a rule which *Bowen,* L. J., said should be kept sacred (*Knowles v. Roberts,* 38 Ch. Dn. at p. 270). In the light of these rules the only paragraphs which, in my opinion, call for notice in connection with the point under consideration are 1, 3 and 12. In the first of these the District Munsif is charged with having decided the case against the appellant in consequence of a grudge entertained by that officer

Zamindar of Tuni v. Bangaru Peda Bennayya.

against the appellant arising from the latter having applied for a transfer of the case from the file of the Munsif's Court. In paragraph 3 the judgment of the District Munsif is stigmatised as given from "more of spite than a real desire to give substantial justice" and in the 12th paragraph the Munsif is charged with "extreme partiality to the defendants and against the plaintiff."

There can be but one opinion as to the character of these imputations. It is no doubt open to an appellant to set up any circumstance showing that the Judge whose decision is appealed against was *disqualified* from trying and deciding the case. It is also quite true that, when a Judge is shown, in the language of *Lord Esher,* M. R., to stand in such a position that he *might be reasonably suspected of being biassed,* he must be held to have been disqualified, [*Alinson v. General Council of Medical Education Registration,* (1894, I. Q. B. Dn. 750)]. But is an appellant at liberty to show that in the particular case the Judge was biassed *in fact?* It may seem at first sight that he would *afortiori* be entitled. No doubt anything which tends to impeach the impartiality of a Judge ought to render him incompetent to decide the case, in order that the administration of justice may not be brought into discredit. And hence in cases where any bias can be presumed, the party is entitled to show the grounds which raise that presumption. These grounds may generally be definable beforehand. But where there is no such presumption the party must not be allowed to question the impatiality of the Judge, for that would mean an enquiry into the motives operating in the mind of the Judge after the cause has been decided—a thing which is well nigh impossible, and even if possible will be too vague to afford a guiding principle. This might have been probably in the mind of the Master of the Rolls when he said in the case referred to, "the question is not whether he (the person whose decision was in question there) was or was not biassed. The Court cannot inquire into that" (*Ib.* 758). If in a case like this it is open to an unsuccessful party to prove actual bias, it is not easy to see why in a case where a decision is pronounced by a person who is disqualified from interest or otherwise from giving such a decision, the successful party should not be entitled to support the decision by showing that the Judge was not *biassed in fact.* That, of course, for obvious reasons, he is not

Zamindar of Tuni v. Bangaru Peda Bennayya.

permitted to do, and it seems to be equally reasonable that in a case like the present averment or proof of the existence of actual bias should be disallowed. The appellant was, therefore, not entitled to make the imputation of actual partiality contained in the paragraphs of the memorandum, referred to above which consequently must of course be held to be scandalous. In reversal of the lower appellate Court's order, I would direct that the objectionable passages in question be expunged and the memorandum of appeal be admitted and proceeded with according to law. In the circumstances of the case, I would make the appellant bear his own costs and those of the 7th respondent up to this date irrespective of the result of the case.

Moore, J.—I agree with my learned colleague in considering that there is an appeal against the order of the District Judge inasmuch as it amounts to a decree. I feel, however, some doubt as to whether it can be held that when the District Judge returned for amendment the appeal petition presented by the vakil on the ground that it contained scandalous imputations against the District Munsif who had tried the case and when the vakil refused to amend, it was not open to the Court to reject the appeal absolutely. The facts of the case were briefly as follows:—The vakil stated in the appeal petition that the judgment of the District Munsif appealed against was a "production more of spite than a real desire to give substantial justice," and that his remarks in it showed "his extreme partiality to defendants and against plaintiff." This petition was returned for amendment as it was couched in language disrespectful to the Court and as the District Judge was of opinion that "such pleadings could not be entertained under No. 6 of the Civil Rules of Practice relating to Pleadings" (p. 134). The vakil, however, represented the petition in its original form, refused to amend it, and in his further petition stated that if he had not urged the grounds of appeal objected to by the District Judge, *i.e.*, those suggesting personal spite and extreme partiality, he would have been found fault with by the District Court at the hearing of the appeal and also by the High Court in second appeal for not having raised such pleas. In making these observations, the vakil was, in my opinion, guilty of contempt in a most aggravated form. On receiving this petition the District Judge rejected the appeal. He should,

in my opinion, have returned the appeal petition and refused to receive it till the objectionable remarks to be found in it had been expunged. This was what was done in the case of *In re Clive Durant* I. L. R., 15 B. 488, and is, I presume, the course that this Court, by the rule of Practice above mentioned, intended that subordinate Courts should adopt in such cases. It is, in my opinion, no part of the duty of a judicial officer to revise petitions presented to it containing scandalous and offensive matter and purge them of such objectionable phrases as may be found in them. Petitioners should be obliged to perform this task themselves, and if they neglect to do so within the time prescribed for the presentation of their appeal or petition, should suffer by the same being rejected as being out of time. I, however, do not object to the order proposed by my learned colleague in the present case being passed as, if the appeal petition now under consideration was again returned to the vakil, so that the District Judge's order of the 18th February 1897 might be obeyed, he would be prevented by the Law of Limitation from re-presenting his appeal petition after it had been purged. It would be unjust to allow the client to suffer so severely for the fault of his vakil.

Zamindar of Tuni v. Bangaru Peda Bennayya.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Jathavedan Namboodri ... ... Appellant* (*Plaintiff*)

v.

Parameswaran Namboodri and others ... Respondents (*Defendants*).

Jathavedan Namboodri v. Parameswaran Namboodri.

Transfer of Property Act, S. 60—Mortgagor and mortgagee—Right of person partially interested to redeem the whole—Partial redemption.

The rule found in S. 60 of the Transfer of Property Act "that a person interested in a share only of the mortgaged property shall not be entitled to redeem his share only on payment of a proportionate part of the debt" creates not merely a liability in the mortgagor for the benefit of the mortgagee, but also a right in the former, to redeem the whole.

A person interested in a share only of the mortgaged property can redeem the whole even against the wish of the mortgagee and cannot be compelled to redeem his share only of the mortgaged property on payment of a proportionate part of the entire mortgage debt.

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* S. A. No. 1672 of 1898. 20th October 1898.

Jathavedan Namboodri v. Paramesswaran Namboodri.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar in A. S. No. 290 of 1896, reversing the decree of the District Munsif of Nedunganad in O. S. No. 77 of 1895.

The facts appear from the judgment of the Court.

V. Bhashyam Aiyangar and *K. P. Govinda Menon* for appellant.

P. R. Sundraiyar for respondents.

The Court delivered the following

JUDGMENTS :—The question for determination in this case is whether the appellant who owns the equity of redemption in the land-plaint item, which forms part of the property originally mortgaged to the defendant for an entire sum, is entitled to redeem the whole of the land mortgaged or the said item only.

The District Munsif held that the appellant was entitled to redeem the whole and gave a decree to him accordingly. But the Subordinate Judge reversed the decree and dismissed the suit, being of opinion that the appellant was not entitled to redeem the whole.

The view taken by the District Munsif seems to be clearly right. *Hall* v. *Haward* (32 Ch. Dn. 430) cited for the appellant is a direct authority in favor of that view. The Court of Appeal consisting of *Cotton, Lindley* and *Lopes,* L. J. J., there held, following the decision of *Lord Hatherly* in *Pearce* v. *Morris* (L. R., 5 Ch. 227) that as the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, so he cannot be compelled to redeem it separately, his right being to redeem the whole subject to the equities of the other persons interested. This decision and that which it followed were referred to by the learned *Chief Justice* and *Handley,* J., in *Konna Panikar* v. *Karunakara,* I. L. R., 16 M. 328, with approval apparently; for the plaintiff there was refused relief, not because he was not entitled to claim a redemption of the whole, but on the unquestionable ground that he could not do so without making the other person interested in the equity of redemption a party to the suit which he had, however, failed to do, though that other person was known and could have been impleaded. Reference may also be

made to *Norendar Narain Singh* v. *Dwarka Lal Munder*, L. R. 5 I. A. 18, where the Judicial Committee lay down that in the case of a mortgage for an entire sum each and every one of the mortgagors was interested in the payment of the mortgage-money and the redemption of the mortgaged estate and each and every one of them had a right by payment of the money to redeem the estate seeking his contribution from others. Ib. 27. In the face of these authorities it is not necessary to notice the other cases cited in favor of the above view. *Arriyapatra* v. *Alamelu*, I. L. R., 11 M. 309, and *Kudhai* v. *Sheo Dayal*, I. L. R., 10 A. 570, which were relied on on behalf of the respondent, are not in point, since in those cases the mortgagees had themselves become entitled to the equity of redemption in part of the property mortgaged, which is not so here.

The pleader for the respondent urged strongly that the rule entitling a person to redeem the whole in circumstances like the present is opposed to principle, inasmuch as a mortgagee for whose benefit the rule that a mortgage is indivisible has been introduced may waive it. But mortgage for an entire sum is from its very purpose indivisible. A division of such a mortgage, borrowing the language of a text writer, is conceivable in theory and may be carried out in practice.

But in order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the paries determined, it is essential that it should not suffer any disintegration (Kelleher on Mortgage in Civil Law, p. 11.) This character of indivisibility exists not only with reference to the mortgagee who may generally be more benefited but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject can under the mortgage get relief except in consonance with the principle of indivisibility referred to. It is upon this principle as pointed out by Mr. *Bhashyam Iyengar* for the appellant that the rule in question rests.

The appeal must, therefore, be allowed. The decree of the Subordinate Judge is reversed and that of the District Munsif restored with the modification that the sum payable by the appel-

Jathavedan Namboodri v. Paramesvaran Namboodri.

lant for the redemption be increased by Rs. 400 as admitted on his behalf before us. The respondent must pay the appellant's costs in this Court. In the lower Courts each party will bear his own costs.

Moore, J.:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, Mr. Justice Subrahmania Aiyar, Mr. Justice Benson and Mr. Justice Moore.

Arunachela Goundan and another ... Appellants (*Defendants* 2 and 4)*

v.

Ramasami Nadan ... ... Respondent (*Plaintiff*).

Arunachela Goundan v. Ramasami Nadan.

Hindu Law—Son's liability to pay father's debts—Cause of action against son to pay father's debt during father's lifetime—*Res judicata.*

(*By the Full Bench.*)

The cause of action for the creditor of a Hindu father to enforce the payment of his debt against his debter's sons arises during their father's lifetime. A creditor suing a Hindu father for his personal debt is entitled to make his sons also parties to the suit so as to have their liability determined.

R. sued T, a Hindu father, for the payment of a debt due to him and joined his sons also as parties on the ground that the debt was contracted for their family benefit. The suit was decreed against T, and was dismissed as regards the sons. Subsequently, T died and R instituted a fresh suit to make the sons pay their deceased father's debt.

Held (*By the Division Bench*) that the cause of action sought to be enforced in the second suit was identical with that in the first suit, and that the second suit was consequently barred.

Appeal from the decree of the District Court of Coimbatore in O. S. No. 68 of 1896.

This appeal coming on for hearing on the 30th September 1898, before *Mr. H. H. Shephard, Officiating Chief Justice,* and *Mr. Justice Moore*, their Lordships made the following:—

ORDER OF REFERENCE TO THE FULL BENCH.

The defendants are the sons of one Tirumalai, who died on the 13th December, 1893. At the time of his death two suits were pending in which the present plaintiff charged Tirumalai as the

(* A. No. 22 of 1898.) 4th November 1898.

Arunachela Goundan. v. Ramasami Nadan.

executant of certain bonds and sought to make his sons also liable on the ground that the bonds were executed by the father for the family benefit. On the 8th January 1894, the fact of Tirumalai's death not having been notified to the District Munsif, judgment was given against Tirumalai; but as regards the defendants the suits were dimissed.

The question now raised is whether it is open to the plaintiff to bring a second suit against the defendants. If the decision in *Natasayyan* v. *Ponnusami*, I. L. R., 16 M. 99 is right, there seems to be no doubt that the present suit is maintainable, for it was there held that the claim to enforce the obligation of sons under Hindu Law gives a cause of action arising only on the death of the father, and that case was approved, certainly not disapproved, in *Ramayya* v. *Venkataratnam*, I. L. R., 17 M. 123. It seems to us extremely doubtful whether this decision can be supported, and the point is one of general importance. In the particular case cited the point was one of limitation, and it was held that the creditor's suit against the son was governed by Article 120 of the schedule to the Limitation Act, the time being counted from the date of the father's death. At the same time it is observed in the judgment that the creditor might, if he chose, bring a suit during the father's lifetime to establish his right against the son (see page 102). This observation is difficult to reconcile with the conclusion at which the Court arrived. But it is certainly correct to this extent that a creditor may, when suing the father for a debt, also obtain a declaration as against the sons that the debt is of such a kind as to make their shares of the property responsible for it. It seems impossible to say that such a suit may not be brought in order to anticipate any objection which the sons might otherwise raise on the occasion of effect being given to an order for sale of the property. If it is right to say that such a suit may be brought, it is but a short step to say that a decree may be obtained against the sons which can itself be executed against their property. It is certainly desirable that all the questions between the creditor and his debtor and the debtor's son should be raised and determined in one suit.

The precise question we wish to refer is :—

Whether the plaintiff could in the suits 160 and 324 of 1893 have prosecuted the claim against the sons of Tirumalai and have

Arunachela Goundan v. Ramasami Nadan.

obtained a decree making their shares in the family property liable for Tirumalai's debt.

V. Bhashyam Aiyangar and *P. S. Sivaswami Aiyar* for appellants.

V. Krishnaswami Aiyar, R. A. Krishnaswami Aiyar and *S. Kasturi Ranga Aiyangar* for respondent.

V. Bhashyam Aiyangar:—The plaintiff obtained a decree against the defendants in the former suits to which they were parties, and therefore, the present suit is not maintainable. Under the Hindu Law, a son was liable to pay the debts of the father on the father's death, and also during the father's lifetime in certain cases, and such obligation was irrespective of any assests derived from the father or the possession of any joint family property. Such obligation was as binding upon the son as if the same were personally incurred by him. The reason of the rule of the Hindu Law in imposing such obligation was the pious or religious duty of the son to save the father from the sin which would result if the debt be not discharged. This obligation, though arising from religious considerations, was a legal obligation imposed by law on the son.

Such obligation not being a part of the Hindu Law which had been adopted by the British Legislature as binding upon the British Courts in the Mofussil (*vide* Section 16 of the Civil Courts Act), the Courts recognise that obligation only to the extent to which such obligation may be associated with succession and inheritance. In the case of inheritance, the extent of the obligation is defined by S. 234 of the Code of Civil Procedure which makes the son a legal representative, liable to the extent of the property devolving on him by inheritance from the deceased debtor. In the case of succession, a son succeeds by birth as co-owner with his father in respect of his father's heritage; and on the death of the father, he succeeds to the whole of the father's heritage by becoming sole owner. The Privy Council in *Kantoo Lall's* case (L. R., 1 I. A. 321) decided that by reason of such obligation, the son's interest in the father's heritage was as liable during the father's lifetime as it would be after his death. The principle of the decision was that the son could not complain of an act on the part of the father whether voluntary or involuntary which would have the effect of relieving him from the liability which would attach to him on the death of the father, if the liability had not been discharged by the act complained of.

Arunachela Goundan v. Ramasami Nadan.

And this decision has ever since been followed by the Privy Council and by the Indian High Courts including the Madras High Court which was for some time reluctant to follow the same(1).

Apart from cases in which the father incurs a debt on behalf of himself and as the agent of his son, in which case the debt personally binds both, the father's debt, whether incurred for a family purpose or for any other purpose not being illegal or immoral, is equally binding upon the son to the extent of his interest in the joint family property of himself and his father during the lifetime of the father, and after the death of the father to the extent of the whole family property to which he succeeds by surviorship.

It being the duty of the son under the Hindu Law, to avert the consequence of the sin which the father committed when he died indebted, by discharging the father's debt, and also to discharge such debt during his lifetime when he became incapable of discharging it, it follows that, under the Hindu Law, the son cannot even during his father's lifetime, when the father is not incapacitated, interdict alienation by the father of the joint family property for the discharge of such debt. If, therefore, his interest in joint property is liable, even during the father's lifetime, to be sold for the personal debt of the father, it necessarily follows that he can be joined with the father in a suit brought for realising such debt by the sale of family property, and personally from the father. A separate suit also may be brought against the son if he has not been impleaded in the suit against the father. The cause of action against the son will be the same as against the father. Therefore time will begin to run in favor of the son from the date that it begins to run in avor of the father.

(1) *Vide*—

Deendyal Lal v. *Jugdeep Narain Singh*, L. R., 4 I. A., 247.
Suraj Bunsi Koer v. *Sheo Prasad, Ib.*, 6 I. A., 88.
Muttayan Chetty v. *Sangili, Ib.*, 9 I. A., 128.
Hurdey Narain v. *Rooder Perkash, Ib.*, 11 I. A., 26.
Mussamut Nanomi Babuasin v. *Modun Mohun, Ib.*, 13 I. A., 1.
Ponnappa Pillai v. *Pappuvayyangar*, I. L. R., 4 M., 64.
Gurusami v. *Chinna Mannar*, I. L. R., 5 M., 37.
Kunhali Beari v. *Keshava Shanbaga, Ib.*, 11 M., 64.
Narasinga v. *Subba, Ib.*, 12 M., 139.
Venkatrama v. *Senthi Velu, Ib.*, 13 M., 265.
Pursid Narain Sing v. *Honooman Sahay, Ib.*, 5 C., 845.
Laljee v. *Fakir, Ib.*, 6 C., 138.
Khalilul Rahman v. *Gobind Pershad, Ib.*, 20 C., 328.
Jamna v. *Nain Sukh, Ib.*, 9 A., 493.
Badri Prasad v. *Madan Lal, Ib.*, 15 A., 75.

Arunachela Goundan v. Ramasami Nadan.

In support of this proposition reference may be made to the analogous principle adopted by the English Courts in suits brought against the husband for the ante-nuptial debts of the wife. In *Beck v. Pierce*, L. R. 23 Q. B. D. 316, it was held that the cause of action against the husband was the same as against the wife, and that time began to run as against both the husband and the wife from the date of the accrual of the obligation as against the wife, though the husband's liability to pay the debts of his wife to the extent of the wife's property in his hands, arose only on the marriage. It may be observed that, in that case also, the creditor may bring a suit both against the husband and the wife jointly for the recovery of the ante-nuptial debts. But if the creditor sues only the wife in the first instance, he can sue the husband afterwards.

Mr. V. Krishnaswami Aiyar:—Under the texts of the Hindu Law, there is no liability on the son to pay the father's debts during his lifetime. The liability arises on the father's death because the son is bound to save the father from the hell to which the father will be consigned for the non-payment of his debts. The obligation is therefore called "pious"—not in the sense that it is not legal. The Hindu Commentators, the Mitakshara (II, 50 p. 109 Colebrooke), Vyavahara Mayukha (V. N. Mandlik's Vya Mayukha 112, 113), and Jaganatha's Digest, Vol. I., p. 183, say the same thing (see also Mayne's Hindu Law, Section 283, West and Buhler, S. 640). This liability is independent of the taking of assets. But under Section 16 of the Civil Courts Act the Courts are bound to enforce it to the extent of the assets taken by the son. The Privy Council has in certain cases extended this liability even during the lifetime of the father by validating sales and mortgages for antecedent debts by the father and sales in execution of decrees which included the son's interest. The way in which the Privy Council has proceeded to this is thus: The father is bound to pay his debts. If he fails to pay them during his life, the sons are bound to pay them after his death. He has power during his lifetime to alienate family property for certain purposes. Therefore, his alienation for payment of debts which the son will be bound to pay, if undischarged after his death, is valid. The Courts themselves in execution do what the father himself may have done. Therefore, the sale of sons' interest also in execution is valid. There is no decision of the Privy Council and none in the Indian High Courts which is authority for the passing of a decree for the father's debt against the sons' shares also (*Jamna* v. *Nain Sukh*, I. L. R., 9 A. 493; *Narasinga* v. *Subba*, *Ib.* 12 M. 139; *Arunachala* v. *Zemindar of Sivagiri*, *Ib.* 7 M. 328).

The cause of action is not one and the same against the father and the sons. If one and the same, the rule in *King* v. *Hoare*, 13 M. and W. 494 followed in *Kendall* v. *Hamilton*, 4 App. Cases 504, will preclude a second suit against the sons. Though such a second suit has been held not to lie in the case of a family debt (*Gurusami* v. *Chinna Mannar*, I. L. R., 5 M. 37) it has been held to lie when the son's pious obligation is sought to be enforced (see *Karnataka Hanumantha* v. *Andukuri Hanumayya*, I. L. R., 5 M. 232, and *Venkatarama* v. *Senthivèlu*, *Ib.* 13 M. 265). If the causes of action were distinct, the cause of action against the father only and another cause of action against the sons only cannot be joined in the same suit.

The authority of the Hindu texts and commentators being clear that the liability is only after the father's death, they cannot be abrogated altogether by the British Courts. To the extent to which the Privy Council has indirectly enforced the liability during the father's lifetime the Courts in this country are bound. Beyond that they cannot go. If the Courts give a decree to the creditor of the father against the sons, they will be repealing the Hindu Law.

As regards the decision in *Beck* v. *Pierce*, 23 Q. B. D. 316, it has special reference to the history of the law in England as regards married women's property. Under the Common Law, the husband succeeded to the estate and liabilities of the wife on marriage. It was practically a case of succession, and just as in the case of a legal representation time ran against the husband from the date of the accrual of the obligation to the wife, the Married Woman's Property Act said that the liability of a *feme sole* should not be extinguished on marriage, but should continue as regards her separate estate, and that the liability of the husband should be limited to the property he took from her, both being liable after marriage. The Court of Appeal simply said that if there was to be any change in the law of limitation as regards a wife's debts, the Act would have stated it. In the absence of any such statement the previous rule of limitation continued.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice.*—The question referred appears to me in itself a very simple one when once the true nature of a son's obligation under Hindu Law is understood. The reference was rendered necessary by the decision in I. L. R., 16 M., which has apparently been approved in later cases. There are, moreover, dicta in the reports to the effect that the son's liability under Hindu Law in respect of the father's debts arises only on the

Arunachela Goundan v. Ramasami Nadan.

death of the father. The question is whether that opinion can be reconciled with the doctrine of the son's liability which has been developed in a series of cases beginning with *Hanuman Persaud's* case in 1856. Referring to that case in 1874, the Judicial Committee say: "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts, because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts (*Girdharee Lall* v. *Kantoo Lall*, L. R., 1 I. A., p. 331). Since 1874, the decisions of the Judicial Committee are consistent in holding that as the son's liability may be enforced through the medium of a sale of the ancestral property executed by the father, so it may be enforced by a sale in execution of a decree against the father, and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be *liable* *Suraj Bunsi Koer* v. *Shoe Persad Singh*, I. L. R., 5 Cal., p. 169). As regards both of the two points involved in this proposition, there was considerable reluctance on the part of this Court to abandon their former view and to adopt that enunciated by the Judicial Committee. In the *Sivagiri* case (1880), the Court held that, although there was a pious duty binding the son to pay his father's debts, the duty was not a legal one, unless it were shown that the debt was incurred for the benefit of the family. This decision was overruled by the Judicial Committee, and so the legal obligation of the son to pay his father's debts was distinctly declared for this Presidency (L. R., 9 I. A. 128).

On the other point, *viz.*, the operation of a decree against the son of a Hindu judgment-debtor, not made a party to the suit, this Court was also unwilling to adopt the view which favoured the interest of the creditor. This point arose alike in cases in which there was a decree against the father and in cases in which it was sought to use the decree against members of the family not being sons of the judgment-debtor (*Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R., 4 M. 38; *Sivasankara Mudali* v. *Parvati Anni*, *Ib.* 97; *Gurusami* v. *Chinna Mannar*, *Ib.* 5 M. 37; and *Subramaniyayyan* v. *Subramaniyayyan*, *Ib.* 125). For both cases alike, the Judicial Committee has

Arunachel Goundan v. Ramasami Nadan.

authoritatively declared the law. Although the decree may have been passed against the father or the manager of the family only, the son or the other members of the family are not at liberty to challenge the consequent sale except by questioning the existence or nature of the debt (*Nanomi Babuasin and others* v. *Modhun Mohun and others*, I. L. R. 13 C., p. 21., and *Dault Ram* v. *Mehr Chand*, I. L. R., 15 C., p. 81.) In the matter of proof there is undoubtedly a distinction between the two cases,—against the son the creditor has to make a negative allegation, while against other members of the family he has to assert that the debt was incurred by the manager for their benefit. In other respects, as it appears to me, the two kinds of claim stand on the same footing. In either case the creditor is seeking to do through the Court what the father or manager who has incurred the debt could lawfully do for himself. The same form of decree would serve in both cases. The decree after stating the sum due should declare that the debt is binding on the defendant, who as father or manager incurred it and on the other defendants as members of an undivided Hindu family and should then direct payment of the same by the father or manager in the ordinary way and, as to the other defendants, should direct payment by them out of the ancestral property of the said family—(compare judgment against married women, page 75, Annual Practice, 1896). It is argued that, notwithstanding the operation which may be given to a decree against the father, there is no cause of action against the son during the father's lifetime, because under Hindu Law the liability to pay debt arises only after his death and texts of Hindu law are cited in support of the argument. But when in effect it is conceded that the qualified obligation of the son may be enforced in the only way possible during the father's lifetime, this contention is, in my opinion, wholly unsustainable. For no apparent reason a distinction must be made between the two cases above mentioned. Against the members of the family along with the manager the creditor may bring a suit, founding his claim against the manager on the contract and against the others on the rule of law making the ancestral property liable for debts properly incurred by the manager. In that case all the questions which can arise between the creditor and the family may be decided in one suit to which they are all parties, and according to the view formerly taken that was the only proper way for bringing such questions to decision. But

Arunachela Goundan v. Ramasami Nadan.

as against the son, it is said that the creditor's cause of action does not arise until the father dies; and then it is said the cause of action is not founded on the contract with the father, and therefore as regards the law of limitation both the starting-point and the period are different from what they are in the father's case. This was the point apparently decided in I. L. R., 16 M. 99. In the judgment in that case the contention that a son's obligation arises only on the father's death was overruled, and it is not denied that a suit may be brought against the sons in the lifetime of their father. The suggestion, as I understand, is that there may be a declaratory suit against the son combined with the claim agasnst the father, or the creditor may wait till the father has died and then get an executable decree against the son. The reasoning of the judgment I am unable to follow. In my opinion it is a mistake to say that a creditor wants a declaratory decree against the debtor's son. The decree which he requires and to which he is entitled is, as I have said, precisely the same decree as that which he can on proper proof obtain against other members of the family. The fact that such a decree may be obtained means that the son is subject to a present obligation, and if there is such an obligation, it cannot be said that there is not a cause of action.

For these reasons I answer the question in the affirmative.

Subrahmania Aiyar, J.—For the purposes of the present reference it is not quite necessary to enter into the history of the general question of a Hindu son's liability in respect of his father's debt discussed with much learning in the elaborate judgments delivered in *Ponnappa Pillai* v. *Pappuvayyanagar* (I.L.R., 4 M. 1). Nor do I consider it necessary to deal with the points, incidentally raised in the argument before us. I shall, therefore, confine myself to the sole question referred, which, notwithstanding what was strongly urged on behalf of the respondent, seems to be scarcely arguable from the point of view suggested for him. The argument on his behalf to the effect that the Hindu Law does not recognise any liability on the part of a son with respect to his father's personal debt, not secured by a mortgage of their joint property, so as to entitle the crediter to sue the sons in the father's lifetime, was rested, if I am not mistaken, on the circumstance that, while numerous direct and distinct statements are to be found in the Smrithis

Arunachel Goundan v. Ramasam Nadan.

and the commenatries as to a son's (now obsolete) liability *independent of assets,* no similar statement is to be found in those works as to the existence of the liability now in question. This absence of express authority on the matter in the Hindu treatises of the class mentioned is, however, in my opinion, quite explicable consistently with the view that such liability was nevertheless recognised by the old Hindu Law. Now attachment and sale of family lands for debt are among the peculiar features of British Judicature and are creatures of modern legislation, such remedies having been entirely unknown to the indigenous system of law. The chapters of the Mitakshara on the administration of justice, so far as one can ascertain from Macnaughten's translation, make no allusion at all to remedies of that description, and it may be taken that no other early Hindu treatises on law provide for such remedies, considering that West and Buhler in their Digest say that "nowhere amongst the provisions of the Hindu Law for enforcing payment of debts is such a process as the attachment and sale of the lands of a family mentioned" (p 649). Again, the rule that a son is not estopped by adjudications in judical proceedings to which his father is a party but he himself is not, now generally enforced strictly, was apparently not so enforced according to the Hindu system, under which the representative character of a father appears to have been admitted to a much greater extent than our Courts are disposed to allow at the present day. For a suit by a father alone with reference to what concerns the family can now be objected to successfully on the ground of non-joinder of the sons; whereas, such an objection was clearly untenable in the days of the commentators as will be seen by what Vijnanesvara says when treating of a plaint or declaration. He there points out that "the term plaintiff or complainant includes the sons and grandsons of those persons, their interests being equally involved" (Grish Chandra Tarkalankar's Edition, p. 19). When such a state of things prevailed, questions like those which so frequently crop up since the decision of the Judicial Committee in *Kantoo Lall's* case, with reference to the effect of decrees obtained by a creditor against a father and of the attachment and sale thereunder upon the rights of the judgment-debtor's sons, could not possibly have arisen when the Smrithis or the commentaries were written. And it seems to me that is why no rules bearing on such questions are propounded in those works.

Arunachela Goundan v. Ramasami Nadan.

Moreover, notwithstanding the recognition of the equal right of co-parceners inclusive of sons in the family property, the position of of a manager in a family appears to have been in those early days one of such trust and responsibility, that even with regard to debts unquestionably binding on all the members of an undivided family consisting of brothers, the books speak as if the duty of meeting those obligations, lay, not on all the co-parceners, as it really did, but on the managing member alone. In support of this statement I may quote from that portion of the Mitakshara which relates to the topic of "Debts payable by whom and when"—the following passage "(In the text under consideration) the plural number has been used as "sons or son's sons", consequently if there are many sons if divided, they must pay the debt, according to their respective shares. It appears from this, that, if they are undivided, and have joint concern, he, amongst them who is the head or chief, is bound to pay." (Grish Chandra's Edition, p. 110). When such was the view in regard to a brother in management, it is easy to understand why old Hindu writers, in dealing with the law as to payment of debts in the father's lifetime, do not expressly refer to the sons except where that natural and pre-eminent head of a family is unwilling or incapacitated to perform the functions incident to his position. The point will be rendered still clearer when we consider the ground on which payment of debt is enforced. The duty of paying one's debts was, perhaps, never more impressively laid down than it was by the Smrithis and the commentaries. The duty is sought to be enforced not only as a legal and moral duty, but also as a religious duty; it being laid down that one dying indebted must undergo pains and penalties in his *post-mortem* existence and even in future births. It is to extricate the father from continuing to suffer from such evils that the son was, after the former's death, compelled by that law to pay his debts notwithstanding that he left no assets. How then can it, with any show of reason, be maintained that there was under that law, as it stood before the British rule, no liability on the part of the son, even when he is possessed of assets, because the father is alive? Such a contention must have appeared very strange to legislators and lawyers who admitted that even in the lifetime of a father his creditor was legally entitled to *arrest the son and detain him* in order to put pressure on the father to pay up the debt as will be seen from a text of Brihaspathi quoted by commentators where it is stated "When a debtor is forced t

Arunachela Goundan v. Ramasami Nadan.

pay his debt by the tying of his son, wife, and cattle, and by the doorway being obstructed (by the creditor), then is *acharitham* (confinement) [said to be used]" (see Ex. Gr. Vyavahara Mayukha ch.V, sec. IV 1—4, Mandlik's Hindu Law 109; see also Jagannatha's Digest, CCXXXIX, Higginbotham's Edition, Vol. 1, page 233).

No doubt owing to the facility now unavoidably afforded to an unscrupulous person, whether he be a creditor of one who is undivided, or an undivided member who is concerned in the payment of a debt, to commit fraud through the machinery of the Courts, the question of the liability of a son in respect of his father's debts, in so far as the former's interest in the joint estate is concerned, has become one of great practical importance. But, that was not the case, as already stated, in times when involuntary alienation of family lands by attachment and sale was unknown; and a point like the one we are considering naturally enough called for no notice at the hands of the lawyers and legislators of those times, and was therefore not discussed or provided for by them.

Be this as it may, it is impossible to hold under the law, as it stands established by the repeated decisions of the ultimate Court of Appeal, that a creditor suing a Hindu for his personal debt is not entitled to include, as defendants in the suit, the debtor's sons. For, in cases like the present, the sons, as persons likely to be affected by proceedings taken against their father, have an undoubted right to raise questions as to the existence or the character of the debt, notwithstanding any decree passed against the father without the sons having been made parties, and to raise such questions during the lifetime of the father. How could the other party, concerned in the trial thereof, be held to be precluded from calling upon his adversary in the matter to raise any objection he wishes to urge against the creditor's claim to recover his debts even against the adversary's share of the estate, so as to guard against further litigation which might arise and very often does arise if a decree is obtained against the father alone, and to render impossible the doubt, uncertainty, and trouble, which generally attend an execution-sale under such a decree? For the due protection of the rights of the class of creditors and debtors under consideration, and on the general principle that all persons having any interest in the subject of litigation may be made parties, it must be held that a creditor, in the position of the appellants, is entitled to make the sons defendants in a suit for the father's debt, even when it has not been incurred for the benefit of the family, or has not been secured by a mortgage of the joint estate.

Arunachela Goundan v. Ramasami Nadan.

The answer to the question referred is in the affirmative.

Benson, J.—I am of opinion that the question referred to us must be answered in the affirmative.

However reluctant this Court may have been to admit to the fullest extent the liability of a Hindu son's interest in the joint family property for a personal debt incurred by his father, it must be conceded that that liability has been established by a series of decisions of the Privy Council by which we are bound.

Speaking broadly, the father may himself alienate the property in order to satisfy such a debt, or the creditor may obtain a decree against the father, and, in execution of it, he may by proper steps bring the whole family property to sale, and the son can resist such alienations if he can show that the alleged debt had no existence or was incurred for "an illegal or immoral purpose" in the technical sense in which those words are understood in the law books, but otherwise the alienations will bind the son's interest, even though he has not joined in the sale, or been a party to the suit, or execution proceedings (L. R., 1. I. A. 321; L. R., 6. I. A. 88; L. R., 9. I. A. 128. L. R., 13. I. A. 1). Such a suit, therefore, affects or may affect, the son's interest, and the son, if not made a party to it, may in the execution proceedings thereon, or in a subsequent suit even in the life-time of the father question the existence or binding character of the debt. It follows that the creditor suing the father, in a case like the present, may, and, in fact, ought to, join the sons whose interest he intends to bind, and thus obtain a determination of the whole question in one suit, rather than leave the liability of their interests to be determined in subsequent litigation.

This view is in no way repugnant to the principles of Hindu Law, but is in accordance with them, as shown in the judgment of my learned colleague, Mr. Justice *Subrahmania Aiyar*, with whom I concur.

Moore, J.—I concur with Mr. Justice *Subrahmania Aiyar* in holding that a creditor suing a Hindu for a personal debt is entitled to inlude as defendants in the suit the debtor's sons, and, therefore, return an affirmative answer to the question referred to the Full Bench.

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